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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936

No. 372

CARL W. McNEIL, DOING BUSINESS AS
McNEIL'S LIQUOR STORE,
(Defendant) Appellant,

vs.

JOSEPH TRINER CORPORATION, A CORPORATION,
(Plaintiff) Appellee.

Brief of Appellee.

HAMILTON MOSES.
WALTER BACHRACH,
STANLEY MORRIS,
R. WEYAND,
Counsel for Appellee.

BYRNES LAW PRINTING CO., 111 N. WACKER DRIVE (COR. WASHINGTON ST.) TEL. FRANKLIN 2000

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(Defendant) Appellant,

vs.

JOSEPH TRINER CORPORATION, A CORPORATION,
(Plaintiff) Appellee.

Brief of Appellee.

The official report of the opinion rendered below by the State Supreme Court is 363 Ill. 559 (R. 38). The opinion is also reported in 2 N. E. (2d) 929 and 104 A. L. R. 1452. The latter report is annotated.

The statement of facts, as contained in the opinion, is adopted herein and, for brevity's sake, will not be repeated (R. 39-43).

SUMMARY OF ARGUMENT.

The construction which the Illinois Supreme Court has placed on the terms of the Illinois Fair Trade Act makes the various definitions and interpretations of that court a part of the statute itself in determining the constitutionality of the statute.

The act was adopted for the purpose of protecting the good will of producers and distributors who market commodities of standard quality, under a trade-mark, brand or name, in fair and open competition with like commodities produced by others. The act also has as its purpose the prevention of the unfair advantage which is taken of consumers through the use of leader advertising, the safeguarding of the public from the debasing of the quality of goods sold under a trade-mark, brand or name as a result of a price demoralization, the conservation of brands which might be driven from the market by the cut of their price, and the elimination of monopolistic tendencies which occur when brands are destroyed by price-cutting or when retail outlets for a commodity become unavailable.

The means provided by the Legislature for the achievement of these purposes is the granting of permission to producers or distributors who market goods which are in fair and open competition with other goods of the same general class, to restrict the use of their trade-mark, brand or name in cut-price transactions, by entering into vertical resale price maintenance contracts with all persons in their distributive system and the subjection of any person, whether a party to such a contract or not, who wilfully and

knowingly sells, under the trade-mark, brand or name at a price less than that stipulated in such contracts, commodities which he has acquired with knowledge of such vertical resale price maintenance system, to an action for unfair competition, at the instance of any person damaged thereby.

The cases at common law recognized that a trade-mark owner or his distributor had by virtue of his trade-mark, an interest which justified restriction of the resale of his trade-marked commodity at cut prices in instances where such conduct would injure his good will. While these cases did not protect the good will in a trade-mark, brand or name from injury through the price-cutting of persons who were neither parties to the vertical resale price maintenance system, nor induced a breach of a contract of that system, cases dealing with patents, copyrights and secret processes, resting on an erroneous construction of the patent and copyright acts and by analogy the secret process law, developed rules by extending common law principles of contract law such as the third party beneficiary and inducing breach of contract concepts, which by analogy, could be applied in the field of trade-marked goods to afford the protection needed to preserve the good will of the trade-mark of the producer or his distributor and to safeguard the public from the injuries of price-cutting. The Illinois Fair Trade Act, as construed by the Illinois Supreme Court, adopts the principles developed in the patent, copyright and secret process cases, in so far as they are applicable to the restriction of the use of a trade-mark, brand or name in a cut-price transaction and makes the conduct of third persons who with knowledge of the vertical resale price maintenance system use the mark in a cut-price transaction, actionable as unfair competition.

The Legislature of a state may by the exercise of its police power, enact laws for the purpose of protecting trade-marks, trade-names and brands, safeguarding the public from injurious forms of advertising, preserving brands and their accessibility for consumers, and eliminating practices which lead to monopolies and trusts.

The granting of a right to producers of commodities which compete fairly in the market, and their distributors, to exclude, through the adoption of vertical resale price maintenance contracts and through the enforcement thereof by injunction or common law damage suits, the use of their trade-mark, brand or name in cut-price sales by either persons to such contracts or third persons who do not enter into such contracts but who acquire the trade-marked, branded or named goods with knowledge of such contracts, is a proper means to achieve the purposes of the Fair Trade Act. Allowing a producer or his distributor to restrict the use of the trade-mark, brand or name by vertical resale price maintenance contracts in such instances and by such means does not, even when such a restriction is imposed on a non-contracting party, involve a delegation to private persons of the power to legislate in derogation of the property rights of others.

The Illinois Fair Trade Act, as construed by the Illinois Supreme Court, and as understood in the light of its historical background and current business experience, is sufficiently definite in provision not to violate the due process of law clause of the federal constitution.

The decision of the Illinois Supreme Court in the instant case does not deprive the appellant of his property without due process of law. He is free to sell his whisky at any price he pleases so long as he does not use the trade-mark and trade-name "Old Quaker." He may use that

mark and name if he sells at not less than the price observed generally by other retailers and established as the standard and uniform price by appellee in contracts with its retailers. Appellant purchased the whisky in question subsequent to the adoption of the Fair Trade Act and with full knowledge of the system of contracts which appellee and other distributors had entered into for the purpose of restricting the use of the trade-mark and name "Old Quaker." The appellant is free to sell the whisky under the trade-mark and name "Old Quaker" if he wishes to discontinue stocking "Old Quaker" and first offered to resell the whisky to appellee or the producer at appellant's invoice price.

ARGUMENT.

I.

The Illinois Fair Trade Act, As Construed By the Supreme Court of Illinois.

The various arguments which have been urged in this Court in support of the asserted unconstitutionality of the Illinois Fair Trade Act under the Fourteenth Amendment, rest for the most part either upon a misapprehension of the construction placed upon the statute by the Supreme Court of Illinois or upon a failure to recognize that under the established rule, the interpretation made by the Illinois court, and not other possible interpretations, is conclusive of the meaning of the statute. *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32, 34, 35. It is wholly immaterial to the issue how the highest court of some state other than Illinois may have construed a statute of identical language, or whether those here challenging the Act differ with the Illinois court on the proper interpretation to be given it. *Louisiana* v. *Pillsbury,* 105 U. S. 278, 294; *Marine* v. *Kalt, Zimmers Co.,* 293 U. S. 357, 363, 366. The extent and limitations of a statute and the method by which they shall be determined rest with the state court. *Smiley* v. *Kansas,* 196 U. S. 447, 454, 455. In determining the constitutional question, the statute is to be considered as though the construction placed upon it by that court was part of its text.

The Illinois Fair Trade Act, *Ill. Rev. Stats. 1935, Ill. State Bar Ass'n, Ed., ch. 140 pars. 8-11; Smith-Hurd Ill.*

Rev. Stats. 1935, ch. 121½, secs. 188-191, has been interpreted* by the Supreme Court of Illinois in two decisions: the instant case, *The Joseph Triner Corporation* v. *Carl W. McNeil,* 363 Ill. 559, 2 N. E. (2d) 929 (R. 38) and *The Seagram-Distillers Corporation* v. *The Old Dearborn Distributing Company,* 363 Ill. 610, 2 N. E. (2d) 940, pending on appeal before this Court at the current term. The opinions of the state court in both of these cases, each written by a different member of the court and concurred in by all of the justices, explain clearly the purpose of the statute and the meaning of its terms.

Those here opposing the Act urge, as they did at each of the successive stages in the proceedings below, that the purpose of the statute is to permit price-fixing; that the aim is no different in this respect from that of legislation which confers upon some administrative board power to regulate the resale price of commodities, except that, in this instance, such power is not vested in a governmental agency but has been delegated to private persons who care to come within the Act.

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*The act was the subject of decision by the Appellate Court of Illinois in two cases decided November 4, 1936, *Old Fort Dearborn Wine & Liquor Co.* v. *Old Dearborn Distributing Co.* reported in Commerce Clearing House Federal Trade Regulation Service, ¶ 25002 and *same* v. *same ibid.* ¶ 25003. Both cases involved appeals from interlocutory injunctions entered by the lower court under the act to restrain price-cutting in order to maintain the *status quo* and prevent imminent destruction of retailer and consumer good will. The Appellate Court in both cases unanimously affirmed the issuance of the writ. That court is the highest state court having jurisdiction to review interlocutory appeals. The act has also been the subject of an opinion by a state *nisi prius* court in the instant case (R. 27-37).

The Illinois Court in its opinion in the instant case denied that the legislative intent was price-fixing, as such, and defined the purpose of the Act as being three-fold: *First*, to protect, in the public interest, the good will which a producer and his distributor have built up around a trade-mark, trade-name or brand, from the destructive effects of price-cutting; *second*, to safeguard the public against the injurious consequences of price-cutting, such as the sale of inferior goods to consumers who are attracted by the obvious bargain presented in the "cut" or "bait" price and who are misled into believing that such price is typical of the seller's ability to sell quality goods generally at low prices, and the destruction of the favored brand either by causing it to be driven off the market or making it necessary that the producer allow its quality to fall in order to keep it there or by contracting the number of retail outlets that will handle the brand and thereby ending its accessibility; and *third*, to protect the producer, distributor and public against the creation of trusts and monopolies in the field of distribution.

The State Supreme Court commenced its opinion below by calling attention to the purpose of the Act as defined in the title, saying (R. 38):

> "The title of the statute expresses its purpose as 'An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name.'"

Later in the opinion, the court itself undertakes to state, generally, the purpose of the statute, using the following words (R. 54):

> "* * *, the Fair Trade act of 1935 has for its major objective the preservation and protection of the prop-

> erty interest of the producer and his distributors in the good will represented by brands, trade-marks and trade-names. The law is also designed to protect the consumer's interest. The legislature by this act, has attempted to benefit alike the producer, the distributor and the public. It is apparent that the objective of the Fair Trade act is not some purely personal goal * * *."

With regard to the assertion that the aim of the statute is bare price-fixing, the court said (R. 56):

> "It is argued that section 2 delegates to such individuals as choose to avail themselves of the benefits of the statute the power to regulate the prices of commodities sold by others. The contention and the argument supporting it rest upon the unwarranted assumption that the Fair Trade act is primarily, and not incidentally, a price-fixing statute. In referring to the purpose of the California Fair Trade act the Supreme Court of that State observed that the act did not merely prohibit price-cutting for the purpose of regulating prices but also prohibited the practice in a legitimate legislative attempt to afford protection to the validly-acquired rights of others. *Max Factor & Co.* v. *Kunsman, supra.*"

And more directly, it was said (R. 56):

> "* * * Specifically, our statute does not contain any mandatory requirements nor does it fix the prices which are to be imposed. No question of governmental price-fixing is, in consequence, involved."

Further recognition by the court that one of the purposes of the Act was to accord protection, in the interest

of the public, to the property rights of producers and their distributors in the good will established about a trade-mark, trade-name or brand, appears in the following statements which were made:

> "The gist of the theory is that the manufacturer of a trade-marked article, sold in competition with articles of similar nature, who has designated a fair price at which he, as well as the distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others * * *" (R. 44-45).
>
> "The manifest legislative intent is the protection of the property interest in a mark, name or brand by preventing the use of the symbol by price-cutting retailers in ways likely to depreciate the property interest." (R. 52).
>
> "The statute * * * prevents * * * filching the good will associated with the descriptive mark and name * * * for * * * ulterior purposes." (R. 53).
>
> "* * * the statute attacked deals * * * with the good will built up by a producer or distributor around a trade-mark, trade-name or brand, and provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition." (R. 54).

That the aim of the statute is to protect the public against injurious consequences arising from the price-cutting of branded commodities, was likewise further indicated by the court. Thus, with regard to consumers being

misled into purchasing inferior goods because of a debased price on some marked commodity, it was said (R. 45-46):

> "The Fair Trade act is intended to curb one of these practices by protecting the manufacturer who has built up a brand or article based on quality and excellence and preventing its use as a 'loss leader' by those who would sell it for the purpose only of inveigling the public into patronizing their places of business in the hope of obtaining a profit on other goods of inferior quality."

Again, (R. 45):

> "* * * it is sound public policy to protect that property right [the good will which has been created for a brand] against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public." (Words in brackets added)

And, emphasizing the unfairness of the bait use made of the good will, as illustrated in the present case (R. 52-53):

> "As applied to the present case, by using the trade-name of a well known liquor the defendant, in effect, attracts the public to his store and thereby induces the visitors to become the purchasers of other goods offered for sale. The defendant thus benefits at the expense of the trade-name 'Old Quaker', by using the plaintiff's products as a means to draw trade."

That price-cutting destroys good will (and consequently the brand dependent for its success upon the good will) and that such destruction affects adversely the public interest (R. 45):

> "* * * it is sound public policy to protect that property right [good will in a mark] against destruction

> * * *. 'The basic theory * * * is that, from a social standpoint, price-cutting, in the long run, adversely affects the public interest, * * *.'" (Words in brackets added)

And (R. 52):

> "* * * it is * * * in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good will, which, in the public interest, should be protected."

The way in which a brand may be destroyed by price-cutting is shown by the facts of the case to which the opinion below adverts and which need not here be re-stated (R. 39-43). However, in one instance, in the course of its opinion, the court pointed out that (R. 52):

> "Such competitors [retailers who cut popular brands] could also destroy a commodity built on merit by underselling, and thus destroying the purpose of the label intended to signify quality." (Words in brackets added)

The aim of the statute, to protect producers, distributors and the public by preventing the rise of trusts and monopolies in the field of distribution, was pointed out by the court during the course of its discussion of the state anti-trust law. The court said (R. 53):

> "The statute clearly does not even tend to legalize trusts or monopolies. It does tend to prohibit trusts and monopolies. *Robert H. Ingersoll & Bro.* v. *Hahne & Co., supra; Fisher Flouring Mills Co.* v. *Swanson,* 76 Wash. 649, 137 Pac. 144."

The provision made by the Illinois Fair Trade Act to effectuate its purposes is principally an adoption of what

has been known to courts for over fifty years as the contract system of vertical price maintenance of trade-marked or branded commodities. Under such a system, to prevent injury to the producer, his distributor and the public, by price-cutting, all retailers who purchase the commodity in the regular marketing channel, agree with some person in the distributive line (producer, producer's sales agent, wholesaler, jobber, etc.) not to sell the commodity under the mark, name or brand it bears, at a price below that established by the producer, or his distributor, as the minimum price for which the commodity is to be sold to the consumer in the particular market. Contract systems vary with different marketing methods, and some systems may be quite intricate, but all have as their essential feature the establishment of a uniform minimum retail price by means of vertical agreements entered into with all retailers.

Section 1 of the act is declaratory of the legality of types of contracts employed by producers, or their distributors, in establishing a vertical resale price maintenence system. The section provides that any contract relating to the sale, or resale, of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer of the commodity and which commodity is in fair and open competition with commodities of the same general class produced by others, shall not be deemed in violation of any law of the State of Illinois by virtue of its containing a provision stipulating a resale price for which the commodity shall be resold under the mark, name or brand.

The contracts referred to in Section 1 are vertical resale price maintenance contracts and not horizontal ones. A reading together of sections 1 and 3 of the Act indicates that the contracts mentioned in section 1 are those entered

into between persons standing at different levels in the distributive line. Such was the construction of the state court below (R. 39):

> "The Fair Trade act • • • permits vertical resale price maintenance but condemns, as do the Federal and State Anti-Trust laws, horizontal arrangements for fixing prices."

And, later in the opinion (R. 53):

> "The only resale price maintenance, if any, permitted by the Fair Trade act is vertical. Vertical price maintenance merely enables a producer, or his distributor, to set a price at which the trade-marked commodity shall be sold to the consumer. • • • Section 3 declares that the act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. In short, it does not apply to horizontal price maintenance."

In the case of *The Seagram-Distillers Corp.* v. *Old Dearborn Distributing Company*, 363 Ill. 610, 614, 2 N. E. (2d) 940, 942, the court below again said:

> "Contracts between plaintiff [a wholesaler having the exclusive right to purchase the commodity from the producer for resale in Illinois] and wholesale distributors, or between distributors and retailers, are denominated vertical price-fixing contracts • • •. Contracts between producers or between wholesalers or between retailers as to sale or resale prices, are denominated horizontal price-fixing contracts and are not within the terms of the statute because of their character as combinations in restraint of trade." (Words in brackets added)

The stipulation for resale price maintenance contained in the contracts mentioned in Section 1, is a stipulation fixing the retail price only in the event that the commodity is resold under the trade-mark, trade-name or brand it bears, and not one which fixes unconditionally a resale price regardless of whether the commodity is resold under the trade symbol. As the court below said (R. 52):

> "The Fair Trade act does not assume to permit restrictions on the price at which trade-marked commodities may be resold, irrespective of whether it is resold under the trade-mark. It permits restrictions to be placed on the *use* of trade-marks, names and brands, not restrictions on the price of commodities generally • • •."

With the same thought in mind, the court said (R. 54):

> "• • • the statute • • • provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition."

And also said (R. 55):

> "• • • a retailer such as the defendant is not expressly prohibited [by virtue of the resale price maintenance contract] from removing the trade symbol and selling the [commodity] • • • at whatever price he pleases." (Words in brackets added)

The commodity referred to in Section 1 is, as stated in the title of the statute, an article of standard quality, that is, a commodity which is sold in units each of identical character. The commodity furthermore must be one which is in fair and open competition with commodities of the

same general class produced by others. As was said below (R. 53):

> "Section 1 specifically provides that a commodity in order to be subject to the contracts permitted under the Fair Trade act must be 'in fair and open competition with commodities of the same general class produced by others.'"

The expression "in fair and open competition with commodities of the same general class produced by others" is to be understood and in its common, accepted meaning. The court in its opinion referred to such commodities as "competing goods * * * of the same general class", and in applying the statute to the case at bar, as "other whiskies of like grade being sold in the Chicago market" (R. 53). The court pointed out that articles such as books would not fall within the term "commodities", saying (R. 49):

> "The defendant * * * invokes *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 * * *. The articles in question were books. The Doubleday books are not commodities within the accepted meaning of the term. Each book rests upon its own merit and outside of the binding and paper content it bears no similarity to the intent of the term used in the act, namely, commodities."

Section 2 of the Act provides:

> "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Section 2, read in the light of Section 1, thus affords a remedy in a court of law against any person who willfully and knowingly advertises for sale, offers to sell or sells a commodity under the trade-mark, trade-name or brand of the producer or trade-mark owner, which commodity is in fair and open competition with commodities of the same general class produced by others, at a price below that stipulated in a resale price maintenance contract entered into pursuant to Section 1, whether or not the person so advertising, offering for sale or selling is, himself, a party to such a contract, provided such price-cutting has caused or threatens to cause damage. The remedy granted is given to the injured person.

The court below in construing Section 2 interpreted the action as limited in application to instances of price-cutting involving the use of a trade-mark, trade-name or brand and not to price-cutting in which the trade symbol was not used, as where the distinguishing mark is removed from the commodity. It is the use of the mark, name or brand, in a price-cutting transaction, which is made actionable as unfair competition, in the event damage flow from such use. The court below said (R. 54):

> "* * * the statute * * * deals * * * with the good will built up by a producer or distributor around a trade-mark, trade-name or brand, and provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition."

And (R. 55):

> "* * * a retailer * * * is not * * * prohibited from removing the trade symbol and selling * * * at whatever price he pleases."

The Fair Trade Act falls into the class of general statutes, that is statutes of broad language intended to act prospectively and be adapted to varying situations of similar character. Resale price maintenance systems necessarily will differ in accordance with the particular marketing method employed by the producer or his distributor. The very breadth of a general statute, however, may permit the conjuring up of situations which seemingly come within the literal meaning of its provision, and yet, if the statute be construed to apply to them, will result in an interpretation violative of constitutional principles. The validity of a general statute, therefore, depends upon its interpretation in a particular situation. As was said below (R. 49):

> "A general statute such as the Fair Trade Act may, of course, be invalid when applied to one set of facts and clearly valid when applied to other fact situations."

In the present case the marked commodity, which was in fair and open competition with other similar commodities, was sold in the Chicago market under a contract system. All retailers in the city who purchased the brand in the regular marketing channel entered into agreements with their respective wholesale distributors not to resell the commodity under its mark, name or brand at prices below those suggested by the producers (R. 40). The wholesalers, acting under the producer's trade policy of having the brand sold at a uniform retail price throughout the city, sold only to retailers who entered into such agreements and refused to sell to any who did not (R. 40). The court below held that under Section 2 of the act, a sale at retail of the brand under its mark and name by a retailer who, with knowledge of the contract system, somehow had acquired the commodity without first having agreed to maintain the uniform price, and which sale was wilfully and knowingly made at a

price below the uniform price stipulated in the contracts executed by the retailers, was actionable at the instance of a wholesaler whose interest in the good will built up around the trade-mark and trade-name, and his business dependent on such good will, were threatened with irreparable injury by the price-cut.

The construction of Section 2 which the court adopted in applying the statute to the facts at bar, interpreted the words "at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act"; as meaning "at less than the price stipulated in the price maintenance contract employed in a resale price maintenance system", that is, at less than the price established vertically by contract with all retailers purchasing the marked commodity in the regular marketing channel. The court below agreed with the Supreme Court of California that the decision in the case of *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409, was distinguishable in that in the New York case the price sought to be maintained had been the subject of only one contract, that is, a contract between the producer and one retailer, and had not been the subject of a contract system in which all retailers in the regular marketing channel had agreed to maintain the price. The court below quoted with approval the California court, in part, as follows (R. 50):

> "Here there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail [sellers] * * * have executed such contracts, and are observing them, and the plaintiffs' distributors have refused, and will refuse,

to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefor decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained * * * [the marked commodity] 'unbeknown' to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here." (Words in brackets added)

Section 2, as above stated, provides that certain conduct with respect to the use of trade-marks, trade-names or brands constitutes unfair competition and is actionable by the injured party. The term "unfair competition" is a time-honored phrase for referring to the protection given by courts to the good will associated with trade-marks, trade-names and brands. In providing that certain use constitutes unfair competition, Section 2 intends to make available the manner of relief and redress afforded by courts in cases of unfair competition. Thus, the injured party may bring an action at law for damages or a suit in equity for an injunction. If the action is at law, he must show the sustention of legal damages; if in equity, a threatened and irreparable injury to his propery interest, etc. The defendant will have his day in court in each particular case and may show all of the defenses known to the law of unfair competition and trade-marks to defeat the plaintiff's contention that his property interest has been damaged or is being threatened with irreparable damage. If the defendant can show that selling at the cut-price

causes no damage, he may continue to cut. The common law as developed in courts of justice has its path open in specific cases to deal with the rights of the parties. In the instant case and in the case of *Seagram-Distillers Corporation, supra,* 363 Ill. 610, 2 N. E. (2d) 940, the suit was in equity and a permanent injunction was allowed. In the two cases entitled *Old Fort Dearborn Wine & Liquor Co.* v. *Old Dearborn Distributing Company,* decided by the Appellate Court of Illinois, First District*, it was held that the chancellor, in a suit brought under Section 2, might grant preliminary relief by way of an interlocutory injunction to restrain imminent and irreparable injury to the plaintiff's interest in the good will, pending a determination upon final hearing of the merits of the case.

The cause of action provided in Section 2 is afforded to "any person damaged". The decided cases in Illinois construing the statute establish that the action thus given may be availed of by any person in the regular distributive line who has a business dependent upon the good will associated with a trade-mark, trade-name or brand, which business has been damaged or will suffer damage in an injury to or destruction of the good will by price-cutting. In the instant case, the court sustained a suit brought by a wholesaler in the distributive line. In the *Old Fort Dearborn Wine & Liquor Co. case, supra,* Commerce Clearing House Federal Trade Regulation Service, Par. 25002, the Illinois Appellate Court made a similar holding and expressly pointed out that the Illinois statute was not to be construed as limiting the cause of action to a producer or manufacturer. In the *Seagram-Distillers case supra,* a wholesaler having an exclusive right to sell to wholesalers and retailers within the state was held entitled to institute suit under the statute.

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*See footnote page 7 *supra.*

The Fair Trade Act is remedial legislation. It provides no penal sanctions. As was said (R. 39):

"The act prescribes no criminal penalties".

Its operation is permissive and conditional. Unless the purchaser and distributors of a marked commodity, when confronted with the destruction of good will by price cutting, set up a vertical contract resale price maintenance system under the Act, no relief may be had. The remedy is one by way of self-help, to individual producers and their distributors, and is unconcerned with governmental regulation or policing. As was said below (p. 56):

> "• • • resale price maintenance laws such as the Fair Trade acts of California, New York and Illinois constitute permissive or conditional legislation. [The] • • • statute does not contain any mandatory requirements nor does it fix the prices which are to be imposed. No question of governmental price-fixing is, in consequence, involved. In other words, the law would remain wholly inefficacious unless the conditions which it prescribes are met. The plaintiff, for example, is not commanded to operate under it. Only in the event that manufacturers or distributors elect to avail themselves of its provisions does the statute come into actual operation." (Word in brackets added)

II.

Background of the Fair Trade Act.

The recent enactment of fair trade acts by the legislatures of fourteen states may best be considered in the light of a development which preceded it in the common law itself during the past fifty years. Some sixty cases, decided in this country in that time, mark the path taken

by producers and distributors of commodities sold under a trade-mark, name or brand, to achieve in courts of law upon common law principles protection against the destructive consequences of price-cutting. The trend of decision in the earlier part of the period, from 1880 to 1905, certainly must have convinced the lawyer practicing at the turn of the century that the common law soon would contain within it the rules which now have become embodied in the challenged statutes. It is altogether probable that had not the passage of anti-trust statutes intervened and such legislation been given the interpretation and application which it received, the decisional law today would afford the remedy which the fair trade acts have made available. The anti-trust enactments, however, exerted a retarding effect upon the growth which had taken place although they by no means ended the granting of relief by courts against price-cutting. The line of cases continued, and as it became apparent in time that preventing price-cutting of marked commodities was in furtherance of the very policy of the anti-trust laws and added to the public welfare, new principles were evolved and a remedy accorded. However, the law never quite afforded the complete protection which the fair trade acts allow.

Viewed in its common law background, the provision of the fair trade acts involves neither novel nor startling doctrine. It is difficult to believe, in the light of the decided cases, that the statutes transcend constitutional limitations. The principles involved rest upon common law rules of contracts and tortious interference with contractual relations, upon trade-marks and unfair competition, all as such rules had been developed and applied in the cases at common law dealing with price-cutting.

(a) The trade-mark and its function in the distributive system.

The trade-mark is a comparatively recently recognized legal device finding its origin in the rise of modern commerce. The industrial revolution marked the change from a household economy in which few chattels were produced for sale, or were sold at any distance from the producer, into an era of large productive enterprise and wide distribution. The distinguishing mark identifying the producer or seller is a concommitant of mass production. As late as 1742, chancery courts in England denied injunctive relief for infringement of a trade-mark. *Blanchard* v. *Hill,* 2 Atk. 484. Not until one hundred years later was the good will which a trade-mark owner had acquired, considered property and protected as such by injunction. *Perry* v. *Truefitt,* 6 Beav. 66 (1842).

In 1879, the Supreme Court of the United States referred to trade-marks as acknowledged property rights: The Court also stated that trade-marks found their root in the law of the various states, were dependent upon state law and statute for their security and protection, and were not the subject of congressional enactment except insofar as they may be used in interstate commerce. *Trade-Mark Cases,* 100 U. S. 82, 92, 93, 94.

The property right in a trade-mark which courts protect is an intangible and consists in the good will which the user of the mark achieves in dealing in an article distinctively labeled or marked, making it widely known, and marketing it in a manner which brings the favor of purchasers. Interference with such property is unfair competition. Mr. Justice Pitney in *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403, 412, 413, said:

"The redress that is accorded in trade-mark cases is based upon the party's right to be protected in the good will of a trade or business. • • • The common law of trade-marks is but a part of the broader law of unfair competition."

Modern commerce is characterized by its highly specialized division of labor. Wholesalers, jobbers and retailers all engage in marketing the marked commodity of the producer. In this commerce, the trade-mark is the link binding the producer, the distributor, jobber and retailer to the consumer, and to each other. Through its medium, the wholesaler is enabled to repurchase from the producer, the jobber from the wholesaler, and the retailer from the jobber or wholesaler. Consumers form their habit of repurchasing, and are able to repurchase, because of the symbol.*

Not only has the trade-mark implemented modern commerce but it has played an immeasurably large part in building up the businesses which exist and in making available to the great number of the people commodities of worth at low prices. The mark has also been instrumental in creating modern advertising.

The protection which courts at common law have granted to trade-marks, names and brands and which legislation in the several states has extended, proceeds upon the theory, *first*, that it is sound policy to permit producers and distributors to enjoy the profits which flow from a good reputation, *McLean* v. *Fleming*, 96 U. S. 245, 251, 252; *second*, that in such protection, producers and distributors will have an incentive to serve the public in a manner most

* Murchison, *Resale Price Maintenance* (1917), p. 80, Nystrom, *The Economics of Retailing* (1915), p. 268.

helpful to it; and *third*, that the public will gain in being able through the means afforded by the mark to identify the source of a commodity purchased, and to obtain, by the simple method of repurchasing, a commodity which has proved satisfactory, *Elgin National Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 674, 675, *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 531. The courts have felt that protected use of the identifying mark tended to assure the sustained production of high quality goods, for an unsatisfactory brand soon disappears from the market. Preservation of purity in marks was deemed necessary to assure the existence of a ready standard for the exercise of a judgment as to comparative values.*

(b) Price-cutting as an injury to the good will created by producer and distributor about a trade-mark, name or brand under which a commodity is sold.

In an early day, trade-marks, names and brands were threatened with destruction by a form of unfair trade practice commonly termed "palming off". The wrongful appropriation and debasement of the mark brought about by its unauthorized use by competitors, led to a remedy in the courts. Today, the law of unfair competition adequately protects the producer and distributor against the deceptive use of a mark by a rival trader, and the public is benefited in being secured against the palming off of spurious goods.

In more recent years, the mark has been threatened by a new form of unfair trade practice, which is as destruc-

* Economists recognize these beneficial attributes of trade-mark protection, Nystrom, *The Economics of Retailing* (1915), p. 268.

tive of the good will built up about the symbol as infringement had been. This practice in its various forms has been called "price-cutting of trade-marked commodities", "predatory price-cutting", "loss leader sales", "leader sales" and "bait sales".

A feature of modern marketing is its replacement of an individual or multiple price for a marked commodity by a uniform and standard price.* The assignment of a standard price to commodities by individual retailers, was the forerunner of the establishment by all retailers of a uniform retail price for marked commodities throughout the market. Producers, or at times wholesalers, of branded commodities commenced suggesting to all retailers a uni-

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*In the 19th century, Marshall Field, in Chicago, and A. T. Stewart, in New York, introduced the uniform price system in their respective retail stores. Seligman & Love, in their excellent work, *Price Cutting and Price Maintenance* (Harper & Bros. 1932) (pp. 4-5) say of these men:

> "They conceived the idea that it would be advantageous to introduce a system of fixed prices, from which a deviation would in no case be made. They estimated that it would save a great deal of time and that all the preliminaries connected with the price dickering would be eliminated. They believed, in the next place, that if the customer expected to find a definite price attached to each article he could center his attention upon the real elements in the transactions without the laborious necessity of experimenting in other places. In the third place, they felt that in this way the whole principle of *caveat emptor* would lose its efficacy and that the customer would learn to have confidence in the practices of the store in question.
>
> All these hopes were soon realized. The system of fixed prices proved to be attractive to the consumer and spread like wild fire."

form retail price for their brands. The apparent economic advantages which resulted from the establishment of a uniform retail price assured continuance of the practice as a form of modern business. The producer and his wholesale distributor found that a uniform retail price, because of the resultant fixed margin of return, brought retailer co-operation in pushing the line of goods; that the producer could conduct nation-wide advertising with greater success and profit because of his ability to name the price at which consumers could obtain the advertised commodity at retail stores; that greater consumer good will was obtained because the uniformity in price furnished the public with the means for determining the relative monetary worth of the brand; and that consumption of the goods increased because the purchaser who had found the commodity and price to his liking would re-purchase it without first determining if he could secure the brand elsewhere at lower prices and, meanwhile, falling into purchasing some other brand. Consumers also found that uniformity in the retail price of a marked commodity was to their benefit. They knew in making purchases that they were being charged the same price for a commodity that all others were paying, that they could replace a desirable brand for the same price previously paid for the original article, that they could satisfactorily compare the relative quality and prices of different competing brands, and that they were saved the trouble of spending time in bargaining with any given retail dealer, or in shopping about, in order to avoid paying an unnecessarily high price. On the whole, the adoption of uniform retail prices for marked commodities brought increased efficiency in production and distribution. Observance of price uniformity resulted in a new effectiveness to advertising, a new type of retailer co-operation and a public that was edu-

cated in the monetary worth of various brands. The use of the trade-mark, name or brand in the marketing of commodities, together with prevailing price uniformity, represents the essence of the present American business economy.*

The vast number of producers who sell commodities under a trade-mark, brand or name do not sell directly to the consumer but employ the usual marketing system, with final distribution being placed in the hands of numerous retail dealers. The retail price is generally announced by the producer. In determining the amount of the price, he takes into consideration such matters as the retail price of competing brands or commodities, the cost of production to himself as well as the cost of handling to each of the wholesalers and retailers, the general market conditions, advertising cost, etc.** So long as all the retailers sell the commodity at the suggested retail price the trade-marked, trade named or branded commodity competes fairly with the merchandise of others, and what good will of the public exists for the trade-mark, name or brand, is essentially the result of the relative quality and price of the commodity as compared with that of competing merchan-

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*Montague, *Business Competition and the Law* (1917), p. 216.

**See 13 Encyc. Soc. Sci. 326, 329 (1934) *Resale Price Maintenance* where it is said:

> "One may observe that the resale prices stipulated by manufacturers must be reasonably fair or the merchandise will not be purchased by consumers. The goods for which manufacturers typically desire to have resale prices maintained are in competition with other merchandise of the same sort and with various substitute articles. There is no serious danger that consumers will be exploited by any such scheme."

dise. If the commodity gains or enjoys widespread favor, as do the so-called "national brands", the producer and his wholesale distributors have no difficulty in securing retail outlets and in enlisting the services of the retail dealers to push sales, provided the retail price permits them to make a reasonable profit. The good will of the retailers which a branded commodity gains through public demand for the goods and the presence of a reasonable profit to the retailers, form an extremely valuable property interest which attaches itself to the mark, name or brand under which the commodity is sold.

"Price-cutting" of commodities sold under a trade-mark, name or brand is a practice which a few retail dealers have come to engage in and consists in the selling of a branded or otherwise identified commodity to the consumer at a price that is conspicuously lower than the generally prevailing price for the same branded commodity. It is a practice which has received widespread comment and been the subject of much discussion among business men, economists, lawyers, legislators and judges.* The facts in the case at bar present a typical instance of such price-cutting and its effects (R. 41-43). Albert Haring, in a book entitled *Retail Price-Cutting and its Control by Manufacturers,* published in 1935 by the Ronald Press Company, New York, describes price-cutting and its consequences, as follows (pages 7-8):

> "The manufacturer starts out with a product which is entirely unknown. The item is given a brand name,

*Moore, *Legal Protection of Goodwill* (1936) p. 118, Nims, *Unfair Competition* (3rd ed., 1929) sec. 299, pp. 300ff, Terry, *Price Standardization* (1915) p. 30, Rogers, *Predatory Price Cutting as Unfair Trade,* 27 Harv. Law Rev. 139 (1913). For the treatment of this problem in foreign countries see Seligman and Love, *Price Cutting and Price Maintenance* (1932), pp. 485-523.

and the name is registered as a trade-mark. The maker finds that this product is satisfactory because repeat orders come in. Satisfied customers can now obtain his product when they rebuy. A consistently increasing volume of sales tells the manufacturer that his identified product compares favorably with its competitors and offers a fair value to purchasers. Advertising is then started and the factory is expanded to take care of increased demand. The product, in turn, is improved and sales further enlarged. The plant and machinery have many years of life. There is every reason to believe that the demand for the well known identified product will continue indefinitely.

And then the outlook for a rosy future is suddenly upset because dealers begin to cut the retail prices of this product to profitless levels. At first, the lower prices at a few stores may even stimulate sales, but the inevitable result is that the cut-price stores begin to substitute less prominent competitive products when they can successfully do this. The non-cut-price stores find that price comparisons on the item favor their competitors, so they stop featuring the product or even discontinue stocking it. Dealers, instead of co-operating with the manufacturer to push the sale of his goods, actually reach the point of urging a customer to accept some other brand. Sales drop off, the plant no longer works at capacity and the manufacturer may soon be operating at a loss. * * *

Although the picture, as thus portrayed, is extreme, the question repeatedly emerges: 'should such damage to the good-will of the manufacturer be permitted?' "

(c) Price-cutting as an injury to the public.

Price-cutting of marked commodities affects adversely the public interest as well as the good-will of producers and distributors. The use of the "cut" as a bait to attract customers into the store where inferior goods are sold has heretofore been mentioned. *Seligman and Love* illustrate the practice with several instances.*

"Cutting" is also a device for pushing the sale of private brands, a practice regarded by economists as an undesirable development. C. T. Murchison, *Resale Price Maintenance*, p. 25 (1917).

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*Their work gives the following example (*ibid.* p. 426)

"An official of R. H. Macy & Co. testified that garments with the B. V. D. Label were sold at 44 cents although the suggested price was 50 cents. The store also sold its own brand at 44 cents. For the B. V. D. line it paid the jobber $4 a dozen; for its own line it paid the manufacturer direct only $3.60 a dozen. The quality was the same as that of the nationally advertised brand. It was argued that the Macy brand could be sold at a much lower price and still make as good a profit as B. V. D. item sold at 44 cents. Even at the same price, the store sold 1,000 dozen of its own brand to 50 dozen B. V. D. Replying to this testimony, the president of B. V. D. Company held this instance to be a perfect illustration of the use of standard goods as a 'leader' to draw customers who are switched to an alternative product. He argued that tests had proved the quality of the Macy line to be inferior to that of the B. V. D. line. The effect of this pricing policy, he said, was to give the small number who bought B. V. D. a bargain, but to overcharge the majority of customers who bought the Macy brand. In the end the manufacturer and competing dealers were injured without benefit to the consumers."

Price-cutting in its more harmful aspect tends to promote trusts and monopolies in the field of distribution. It leads to cut-throat competition which in turn destroys all competition. Seligman and Love, *ibid*, pp. 267-269.

Price-cutting likewise leads to the destruction of the brand by driving it out of the market or making it necessary to debase its quality. Either result is adverse to the public interest.

However, Seligman and Love find that the most important consideration in favor of price maintenance lies in identifying the interest of the consumer with the welfare of the producer. They say, (*ibid* pp. 258-259):

> "• • • modern economic life has brought to the front the interest of the producer. We know, indeed, that every human being is a consumer and that he cannot live unless he consumes. But we realize that he can consume only what has been produced and that, from the point of view of economic progress, the growth of consumption and the rise in the standard of life depend upon the increase of production. In a well-balanced community, under the regime of free competition, the point of paramount importance is the welfare of the producer. • • •
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> The application to the problem of price maintenance is clear. If price maintenance resolves itself into a conflict of interests between producers as a class and consumers as a class, modern economics teaches that, except in the clear proof of an existing danger of monopoly, the welfare of the consumers themselves will in the long run be best subserved by permitting efficient production and by refusing to interpose obstacles in the path of the producer. Modern economics, in other words, teaches us that we are first of all pro-

ducers, and only secondarily consumers; that progress in consumption depends upon advance in production; and that it is fallacious to subordinate the welfare of the producer to the alleged interests of the consumer. In the larger sense, the interests of the consumer are coterminous with those of the producer,"

(d) The common law recognized the evils sought to be remedied by the Fair Trade Act and developed the means employed in the statute for doing so.

THE PERIOD FROM 1880 TO 1905

The fair trade acts carry forward a common law development which extends back to the eighties. The principle embodied in the legislation, both as to purpose and means, may be found clearly stated and applied in the decided cases. For some time, producers or distributors of trade-marked commodities, in order to protect their distribution in the retail market against price-cutting, have sought a legal remedy. Some producers or distributors established contract resale price maintenance systems in which all retailers purchasing the goods in the regular marketing channel did so under an agreement not to sell below the uniform price. Other producers eliminated intermediate distributors and sold direct to persons in the retail trade under a form of agreement making such persons agents of the producer.

Apparently, the first case to be decided involving a vertical resale price maintenance system established by contract, is *Clark* v. *Frank*, 17 Mo. App. 602, decided in 1885. Its interest is chiefly historic. A retail dealer of Clark's "O. N. T." thread defended a suit brought by the manufacturer for the purchase price of a quantity of the thread

on the ground that the contract sued upon, in requiring the retailer to maintain a minimum retail price on the product, was void as being in restraint of trade, and, further, that the quantity sold had been purchased from a source other than the manufacturer. It was conceded that there had been price-cutting. The court construed the contract as requiring a maintenance of the price regardless of the source of purchase, and then said, with respect to whether the provision was void, pp. 604-605:

> "We see no force in the argument that the agreement not to sell the goods at less than the trade price was void as being in restraint of trade, so far as it related to goods which might be purchased of other dealers."

In 1889, the validity of a resale price maintenance contract system was before the Supreme Court of the United States. *Fowle* v. *Park,* 131 U. S. 88. The owner of a secret process for making a patent medicine, known as Balsam of Wild Cherry, sold the right of manufacture and sale in certain states to various purchasers and, as part of the consideration, obtained their agreement not to "sell, or cause any of said medicine to be sold, at less price than seven dollars for each and every dozen, except to such persons as shall become their agents for a whole state or territory, and in all cases where such agencies are granted they also promise and agree to take from such agents an agreement, w h a sufficient guaranty or penalty, that no sale of said medicine shall be made at a less price than that above named." The validity of the contract was sustained.

In one of the first cases brought under the Sherman Act, *In re Greene,* 52 Fed. 104 (C. C. S. D. Oh. W. D. 1892), the producer of certain whiskies agreed with its purchas-

ers to pay a rebate to those who maintained resale prices. After holding that the agreement for rebate was not to be interpreted as imposing a duty on purchasers to maintain prices, the court went on to say, p. 118:

> "But suppose the arrangement could by any possibility be construed into a contract between the parties from the date of the promise, or during the stipulated period, it could not be held to be a contract in restraint of trade. • • • Where the restraint is partial, either as to time or place, its validity is to be determined by its reasonableness and the existence of a consideration to support it. • • • In the present case, the arrangement treated as a contract was founded upon a valid consideration, and only secured to the vendors a reasonable protection in their business."

It is interesting to note that for twenty-three years after the decision in *In re Greene,* supra, no prosecution was instituted under the Sherman Act to challenge the legality of resale price maintenance contracts.

In 1898, the Illinois Appellate Court was asked to pass upon the validity of an agency contract prescribing sale prices. *Weiboldt* v. *Standard Fashion Co.,* 80 Ill. App. 67. The Weiboldt Store in Chicago and the Standard Fashion Company entered into an agreement, denominated an agency agreement, in which Weiboldt agreed to sell Standard patterns at the uniform price. In a suit brought against the store for breach of contract, it defended on the ground that the agreement was in restraint of trade and in violation of the Illinois anti-trust act. The Illinois court upheld the contract.

The Weiboldt case appears to be the first one in which the validity of an agency system for maintaining the uni-

form price was sustained at common law and under a state anti-trust law.

In 1899, the courts of New York were asked to determine the validity of resale price maintenance agreements. The first case before them involved the use of such an agreement in connection with the sale of a copyrighted book, *Murphy* v. *Christian Press Association Publishing Co.*, 38 App. Div. 426, 56 N. Y. S. 597. The suit there was for an injunction to restrain a sale of the book at "cut" prices. The defense raised was that the agreement to maintain the prices was void, in restraint of trade. The court in overruling the contention recognized the general rule that a resale price agreement, when entered into with respect to a commodity which is the subject of a monopoly, is invalid at common law as being in restraint of trade, but held that in the case of monopolies granted by law, such as copyrights and patents, the grant of the legal monopoly itself prevented the application of the common law rule against restraints. In effect, the court, in the case, extended the copyright laws by permitting the copyright owner, because of his monopoly, to enter into a resale price maintenance contract even though the subject thereof was a monopoly. A similar holding was made in *Standard American Publishing Co.* v. *Methodist Book Concern*, 33 App. Div. 409, 54 N. Y. S. 55. In a third case, *Walsh* v. *Dwight*, 40 App. Div. 513, 58 N. Y. S. 91, the question again presented itself, this time, however, with respect to a trade-marked commodity. The manufacturer of one brand of saleratus and soda complained that the manufacturer of "Dwight's Cow Brand Saleratus & Soda" was monopolizing the trade in the commodity by entering into contracts with dealers requiring them to maintain certain resale prices and to refrain from handling the saleratus and soda of competing brands. The New York court held that

the contracts were legal and not in violation of the state anti-trust law; that vertical price maintenance agreements were to be distinguished from horizontal combinations. The court said, 58 N. Y. S. 93, 94:

> "There is nothing in this contract that restrains or prevents competition in the supply or the price of any article or commodity. * * * This act [state anti-trust law] did not have the effect of preventing a manufacturer from fixing the price at which his articles should be sold. The act was evidently intended to prevent manufacturers or dealers in any article or commodity of common use from combining together to advance the price of such article or commodity, by which competition in the supply or price of the same would be restricted or regulated; but a contract by a single manufacturer as to the price at which his goods, when manufactured, should be sold by those selected by him for the purpose of sale or distribution, would not be a contract by which competition in the supply or price of the commodity would be restrained or prevented. All of the manufacturers could compete with these defendants in the sale of these goods."

The next cases arose in Massachusetts. The late Justice Holmes, as Chief Justice of the Supreme Judicial Court of Massachusetts, was one of the first to sustain the validity of resale price maintenance contracts. In 1900, in the case of *Garst* v. *Harris*, 177 Mass. 72, 58 N. E. 174, Mr. Justice Holmes permitted Garst, who had established a resale price maintenance system in connection with the retail sale of his patent medicine, which was sold under a trade-mark, to recover liquidated damages for breach of a price maintenance agreement. In 1901 and 1905, Garst was again before the Massachusetts court. *Garst* v. *Hall & Lyon Co.*,

179 Mass. 188, 61 N. E. 219; *Garst* v. *Charles*, 187 Mass. 144, 72 N. E. 839. In the *Hall & Lyon* case, Chief Justice Knowlton held that the plaintiff could not proceed against a price-cutting retailer who without any agreement had acquired the commodities not from Garst but from his vendee. The court said, 61 N. E. 220:

> "In the present case there was not only no contract between the plaintiff and the defendant, * * * but there is no averment or proof that the defendant fraudulently induced and procured the breach of a contract between the plaintiff and any of his vendees, to the detriment of the plaintiff."

In the *Charles* case, *supra*, Garst plead an interference with a contractual relation, and Chief Justice Knowlton there held that where the price-cutter had actually induced a breach, he was liable for damages and could be enjoined.

Thus, between 1885 and 1905, a body of law developed in the United States which gave the manufacturer of a distinguished commodity a legal means for securing protection against the price-cutter. Resale price maintenance contracts were upheld by all courts called upon to pass upon their validity and the agency system of price maintenance had likewise been recognized. The manufacturer, who wished, could set up a vertical resale price maintenance system for the distribution of his goods and then proceed in court against any one in the regular distributive line who broke his contract and cut, or against non-contracting parties who induced a breach for the purpose of cutting.

In England, the law followed the same path. *Elliman Sons & Co.* v. *Carrington & Sons*, L. R. (1901), 2 Ch. 275.

The Bement Case Through Boston Store vs. American Graphophone Company.

In 1902, the Supreme Court of the United States, in the case of *Bement* v. *National Harrow Co.*, 186 U. S. 70, decided that by virtue of the patent act, price maintenance provisions inserted by the plaintiff in agreements licensing various persons to make and sell farming implements under the plaintiff's patents, were valid both at common law and under the Sherman Act. Injunctive relief and damages were allowed. The opinion drew no distinction between a price maintenance provision contained in a license to manufacture coupled with a license to sell and one in a license merely to sell.*

In the decade and a half following the *Bement* decision, the common law remedy against price-cutting, as theretofore developed, exolved fully in a series of lower federal decisions centered about vertical resale price maintenance systems in their use to prevent price-cutting upon identified commodities produced under patents, copyrights and secret processes. In these decisions the lower Federal

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*The Court said (pp. 91, 93):

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee, for the right to manufacture or use or sell the article, will be upheld by the courts. * * * The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition."

courts, proceeding upon the assumption that, under the *Bement* decision, the patent and copyright laws (and on analogy the common law monopoly with respect to secret processes) prevented the application of the common law rule against resale price maintenance of commodities which were the subject of monopolies, fashioned out the principles of vertical resale price maintenance contract systems. While these cases erred in assuming that the patent and copyright statutes (and the common law relating to secret processes) had removed the common law ban upon resale price maintenance of commodities which were the subject of the created monopoly and permitted resale maintenance, the cases, nevertheless, show that where the prohibition has been removed and a statutory grant given, the principles of vertical price maintenance as there developed are to be recognized. The decisions held that the producer, or his distributor, of a commodity produced under a patent, copyright or secret process might establish a uniform price by contractual system in his line of distribution; that damages and injunctive relief could be had against those who "cut" in violation of their contractual undertaking and that similar relief would be given against noncontracting parties who "cut" with knowledge of the contractual system. With respect to non-contracting third parties, the view was taken that price-cutting by such individuals was an interference with the contractual relation and actionable, that the price established by the contract system was part of the granted monopoly and hence that price-cutting constituted an infringement.

A typical case of this period is one in which Mr. Justice Van Devanter, sitting as a member of the Eighth Circuit Court of Appeals, wrote the opinion. *National Phonograph Co.* v. *Schlegel*, 128 Fed. 733 (C. C. A. 8th Cir.). In that case it was held that an exclusive licensee might in equity

restrain his vendee from violating an agreement with the complainant which required the vendee to maintain the uniform price and not to sell to retail dealers who did not sign resale price maintenance contracts. The court regarded the contract as a form of restrictive license imposed on the sale of the patented commodity and indicated that, as such, it would be binding upon any one who purchased with notice of the contract.*

The Circuit Court of Appeals of the Seventh Circuit, in a decision likewise resting on the *Bement* case, *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. 424 (C. C. A. 7th Cir.), held that a patentee who sold all of its patented article under contracts to jobbers requiring them to observe a resale price restriction, could restrain by injunction a sub-vendee who purchased the article from one of the jobbers, and with full notice of the restriction, advertised and sold it at cut prices.

The other patent cases followed the same principle. In most instances resort to the court was had against a price-

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* The court said (p. 735):

"An unconditional or unrestricted sale by the patentee, or by a licensee authorized to make such sale, of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery."

cutter who had not signed a resale price maintenance contract, but with knowledge of the contractual system had acquired the patented article outside of the regular channel of distribution. *Edison Phonograph Co.* v. *Kaufman,* 105 Fed. 960 (C. C., W. D. Pa.); *New Jersey Patent Co.* v. *Schaeffer,* 159 Fed. 171 (C. C., E. D. Pa.); *The Fair* v. *Dover Mfg. Co.,* 166 Fed. 117 (C. C. A. 7th Cir.); *Thomas A. Edison* v. *Ira M. Smith Mercantile Co.,* 188 Fed. 925 (C. C., W. D. Mich.).

The fact of knowledge in the price-cutter that the producer,* in protecting himself, had established a contract system for maintaining the retail price, afforded ground for the allowance of relief.

In *Edison Phonograph Co.* v. *Kaufman,* 105 Fed. 960 (C. C., W. D. Pa.), the court said pp. 961-2:

> "The defendants were advised fully of the reasons which had led to the adoption of the plan for doing business as contained in the 'jobbers' agreement,' and the defendants were distinctly informed that the complainants would not deviate therefrom in any instance. Shortly thereafter the defendants took steps to get a supply * * * ."

In *The Fair* v. *Dover Mfg. Co.,* 166 Fed. 117 (C. C. A. 7th Cir.) the court said, p. 118:

> "The record explicitly establishes that appellant, before it began to deal in this patented product, had full knowledge of the uniform prices that had been

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* Contract systems initiated by distributors were upheld and given similar protection: *Thomas A. Edison* v. *Ira M. Smith Mercantile Co.,* 188 Fed. 925 (C. C. W. D. Mich.), and *National Phonograph Co.* v. *Schlegel,* 128 Fed. 733 (C. C. A. 8th Cir.).

established by appellee and were being maintained by other dealers, and of the limited right of the party from whom it obtained sadirons."

On analogy to the patent cases, the lower federal courts enforced resale price maintenance systems, which had been set up to protect secret processed goods. Relief was granted against parties to the contract system and against third persons who obtained the goods either from someone a party to the system or through indirect means. *World's Dispensary Medical Assn.* v. *Platt*, 142 Fed. 606 (C. C. N.D. Ill. E.D.); *Dr. Miles Medical Co.* v. *Goldthwaite*, 133 Fed. 794 (C. C. D. Mass.); *Wells & Richardson* v. *Abraham*, 146 Fed. 190 (C. C. E. D. N. Y.), Aff'd 149 Fed. 408 (C. C. A. 2nd Cir.); *Dr. Miles Medical Co.* v. *Jayne's Drug Co.*, 149 Fed. 838 (C. C. D. Mass.).

The first of these cases to come before the United States Supreme Court were ones involving copyrights, *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339 and *Scribner* v. *Straus*, 210 U. S. 352. In each of these cases, Macy's purchased from wholesalers, copyrighted books published by the respective plaintiffs. Each book bore a notice stating the retail price and that a sale at a less price would be treated as an infringement of the copyright. The Court held that the only question before it was one of the construction of the pyright law and that the law did not grant copyright owners the right by mere notice to control the resale price.

In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, the right to maintain resale prices on secret processed goods was denied by the Supreme Court of the United States. Mr. Justice Holmes wrote a dissenting opinion. At the time of that decision, Justice Lurton was a member of the Court, but because of his opinion in a case involving the same question, *John D. Park & Sons* v. *Hartman*, 153 Fed. 24 (C. C. A. 6th Cir.), did not participate

in the decision. The *Hartman* case was relied on in the *Dr. Miles* decision. Both cases were suits brought by the manufacturers of secret medicines sold under a system of resale price maintenance contracts, against John D. Park & Sons, who had not entered into any of the contracts, to enjoin the latter from obtaining the medicine by causing regular dealers to breach their contracts, and from selling the medicine at cut prices. In each case it was held that the contract system was an illegal restraint of trade at common law and void under the Sherman Act. It appears that the commodities in question were not in fair and open competition with other commodities of the same general class and that the resale price maintenance contracts stifled all possible competition in the commodity. That this fact was the basis of Justice Lurton's decision seems clear. Thus, he said, p. 42:

> "It is true that the complainant is not in combination with other makers of 'Peruna.' There are no others. If there were, there would not be a complete or general restraint; for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected."

The opinion in the *Dr. Miles* case contains similar comment, 220 U. S. p. 403.*

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* "It is also urged that as the process is such, no one else can manufacture the article. But this argument rests on monopoly of production and not on the secrecy of the process or the particular fact that may confer that monopoly. It implies that, if for any reason monopoly of production exists, it carries with it the right to control the entire trade of the produced article and to prevent any competition that otherwise might arise between wholesale and retail

In *Bauer & Cie.* v. *O'Donnell,* 229 U..S. 1, the Court decided that a patentee could not by mere notice affixed to a patented article, and without entering into resale price maintenance contracts, establish the resale price. In *Boston Store* v. *American Graphophone Company,* 246 U. S. 8, it was held that the patent law did not authorize resale price maintenance contracts.

In deciding the foregoing cases, the Court pointed out that the Congress had power to confer authority to make resale contracts: *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339, 350; *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 405; *Boston Store* v. *American Graphophone Company,* 246 U. S. 8, 26.

Vertical Resale Price Maintenance of Trade-marked Commodities at Common Law.

Patented, copyrighted, secret-processed and trade-marked commodities have been termed "specialties," that is, goods having some particular appeal to the public. As is well illustrated by the situations presented in the decided cases, such commodities are peculiarly susceptible to retail price-cutting. Their identification makes possible their "leader" use. However, while there is such common attribute among them, from another viewpoint they fall into two classes. Patented, copyrighted and secret proc-

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dealers. The principle would not be limited to secret processes, but would extend to goods manufactured by any one who secured control of the source of supply of a necessary raw material or ingredient. But, because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with title."

essed goods, because of their origin in a monopoly to make and vend, generally are not confronted in the market with competing goods of the same general class. On the other hand, commodities sold under a trade-mark, name or brand generally do face such competition. The trade-mark involves no control of source or production but merely protects the good will which has become associated with the mark, against misappropriation by a stranger. No doubt, patented, copyrighted and secret processed goods may in some instances compete with goods of the same general class produced by others, and a trade-marked commodity may involve a monopoly, but as a general rule, the classes are separate. *Robert H. Ingersoll & Bro.* v. *Hahne & Co.*, 89 N. J. Eq. 332, 108 Atl. 128.

The leading state case sustaining the validity of a vertical resale price maintenance contract with respect to a trade-marked commodity is *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144. In that case the Washington Supreme Court held that a retailer who had violated his contract to maintain the resale price of "Fisher's Blend of Patent Flour" could be enjoined from cutting the uniform and standard retail price. The plaintiff was the manufacturer of a blended flour sold under a trade-mark. The flour enjoyed good-will among retailers and the public and was in competition with many other brands of flour. The court, in determining the validity of the contract, applied the test laid down by Mr. Justice Hughes in the *Dr. Miles Co.* case, 220 U. S. 373, 406, namely:

> "To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee * * *."

The court then found that the restraint was reasonable. The case presents an excellent discussion of the economic implications of the subject, the ruinous consequences which flow from price-cutting and the want of any public benefit. Among other things the court said, 137 Pac. 151:

> "Finally, it seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retailers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at, or above, their reasonable price. It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product."

The court distinguished the *Dr. Miles* case, 220 U. S. 373, in that the resale price maintenance contract there involved served no purpose other than to extend an absolute common law monopoly of production and vending.

The California courts at common law likewise sustained a vertical resale price maintenance contract when used in the distribution of trade-marked commodities which were in fair and open competition with other commodities of the same general class. In *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, the California court said, p. 747:

"The contract here relied on does not relate to any olive oil except that manufactured by plaintiff. There is no suggestion that this comprises all, or any large proportion, of the olive oil manufactured or sold in the market supplied by plaintiff. • • •

Under these circumstances we see no reason why the contract alleged by plaintiff should not, as between the parties to it, be held to be valid. • • • By its terms the buyer is not precluded from engaging in any lawful trade. He may sell other olive oil at any price and on any conditions satisfactory to him. • • • There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained. Contracts • • • have generally been upheld where, as here, they had no tendency to create a monopoly."

In *D. Ghirardelli & Co.* v. *Hunsicker,* 164 Cal. 355, 128 Pac. 1041, the California court held that the producer of a brand of chocolate could restrain a retailer from cutting the price which the retailer had agreed with his wholesaler to maintain. All of the brand was sold by the producer to wholesalers under a contract requiring them to exact resale price maintenance contracts from all retailers. The court regarded the producer as a beneficiary of the contracts made between the wholesaler and retailers, 128 Pac. 1043. The *Dr. Miles Medical Co.* case, 220 U. S. 373, and the *Hartman* case, 153 Fed. 24 (C. C. A. 6th Cir.), were distinguished as involving monopolies, 128 Pac. 1043-1044.

In many other state cases, vertical resale price maintenance contracts have been held valid and not within the

prohibition of either the common law rule against restraints or the state anti-trust law. *John D. Park & Sons Co.* v. *National Wholesale Druggists Association,* 175 N. Y. 1, 67 N. E. 136; *Walsh* v. *Dwight,* 58 N. Y. S. 91, 40 App. Div. 513; *Marsich* v. *Eastman Kodak Company,* 279 N. Y. S. 140, 244 App. Div. 295, Affirmed 269 N. Y. 621, 200 N. E. 27; *Commonwealth* v. *Grinstead,* 111 Ky. 203, 63 S. W. 427; *Quinlivan* v. *Brown Oil Co.,* 96 Mont. 147, 29 Pac. (2d) 374; *State* v. *Scollard,* 126 Wash. 335, 218 Pac. 224; *Munter* v. *Eastman Kodak Company,* 28 Cal. App. 660, 153 Pac. 737; *W. T. Rawleigh Medical Co.* v. *Osborne,* 177 Ia. 208, 158 N. W. 566; *Clark* v. *Frank,* 17 Mo. App. 602; *Weiboldt* v. *Standard Fashion Co.,* 80 Ill. App. 67. *Contra: New Century Mfg. Co.* v. *Scheurer* (Tex.), 45 S. W. (2d) 560; *Mills* v. *General Ordnance Co.,* 113 Kas. 479, 215 Pac. 314.

The Illinois Supreme Court in the instant case similarly held that the state anti-trust law did not prohibit vertical resale price maintenance contracts as to marked commodities which competed with other goods of the same general class (R. 52-53, 55).

In *Ford Motor Co.* v. *Benjamin Boone, Inc.,* 244 Fed. 335 (C. C. A. 9th Cir.), the Ford Motor Company sought to enjoin a third person from obtaining cars from one of its dealers and selling them at cut prices to the public. There was some question in the case whether under the resale price maintenance contract used by the Ford Company with its dealers, the dealers were agents or individual retailers. The contract imposed upon the dealers all of the burdens of ownership and required them to pay the price of the car before delivery to him. The court held that the question was immaterial inasmuch as Ford cars were in competition with numerous other cars and maintaining a

resale price upon them did not injure the public. The court said, p. 341:

> "As already suggested, it would be entirely possible for the plaintiff to accomplish all the objects which it seeks under the present plan, by marketing its product through its own agencies, so constituted that there could be no doubt that its salesmen were its agents merely, and not vendees. But, were it otherwise, what benefit would result to the public by opening the door for the bushwhacking competition which, and which only, is likely to follow? It is to be borne in mind that the plaintiff has no monopoly of the automobile business, but only of one out of almost innumerable kinds of cars, all differing in detail one from the other, but of the same general type and all designed to be used in the same general manner, and for the same general purpose. * * * Obviously, therefore, the public already has competition to the fullest extent desirable, not a competition entailing the waste of duplication overlapping effort in marketing the product, with sporadic price-cutting of an irrational sort, but the competition of many products, each independently seeking public favor, against one of like character, but slightly different."

The English cases are in accord with the state cases, and protection is given to the fullest extent to resale price maintenance contracts on marked commodities which are in fair and open competition with other commodities of the same general class. Damages for their breach are allowed and preliminary and permanent injunctive relief granted. *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co.*, L. R. (1915) A. C. 79; *Palmolive Co.* v. *Freedman*, L. R. (1928) 1 Ch. 264.

The Agency and Refusal to Sell Price Maintenance Systems.

Resale price maintenance of commodities on interstate commerce did not end with the *Boston Store* case, 246 U. S. 8. In *United States* v. *General Electric Company*, 272 U. S. 476, the Court sustained the validity of the so-called agency resale price maintenance system. In that case the General Electric Company and its affiliates marketed Mazda lamps through 21,000 retail dealers located in various parts of the United States. Various forms of agreements were used which established an agency relationship between the company and the dealers and required them to sell at the prices prescribed by the principal. The court held that the system did not violate the Sherman act. A comparison of the agency and contract systems of price maintenance may be found in an article, Klaus, *Sale, Agency and Price Maintenance*, 28 Col. Law Rev. 312, 441. State courts have likewise approved the agency system and have issued injunctions against third parties who obtained the commodity from some agent and cut the price to restrain price-cutting. *Singer Sewing Machine Company* v. *Lang*, 186 Wis. 530, 203 N. W. 399. Also *Landauer* v. *Bard-Parker Company*, 210 N. Y. S. 635, 125 Misc. 461.

This Court has also approved resale price maintenance achieved through the so-called refusal to sell system. *United States* v. *Colgate & Co.*, 250 U. S. 300; *Frey & Sons, Inc.*, v. *Cudahy Packing Co.*, 256 U. S. 208; *Harriet Hubbard Ayer, Inc.* v. *Federal Trade Commission*, 15 F. (2d) 274 (C. C. A. 2nd Cir.) Cert. den. 273 U. S. 759. When the *Colgate* case was in the lower federal court, District Judge Waddell sustained the contention of counsel that the Colgate Company had an interest in its goodwill on

soaps which it could protect from price-cutting, saying 253 Fed. 522, 527 (D. C. E. Va.):

> "It cannot be said that the defendant has no interest in the prices at which its goods shall be sold. On the contrary, it had a vital interest, in so far as cutting the same would tend to demoralize the trade, and might have been more injuriously affected by the result of this disorganization than the public would be benefited by a temporary reduction in the prices of its products. The sale of the defendant's particular soaps cannot be said to be a necessity, or that the same bears a large proportion to the entire manufacture of soaps of the kind and grade involved. The successful prosecution of the defendant's business, and the continued use of its soap by the public, depend upon its ability to find and maintain a market for its output. Price cutting would almost inevitably result in reducing the defendant's business in a given community to only those engaged in that practice, and deprive it of the patronage of the great body of wholesalers and retailers engaged in what they believed to be a fair and legitimate conduct of their business. It by no means follows that, in the end, the public would be benefited, as the price cutter could easily raise prices after the demoralization caused by his conduct had been brought about, and profit individually by so doing. What the public is interested in is that only reasonable and fair prices shall be charged for what it buys, and it is not claimed that the defendant's manner of conducting its business has otherwise resulted."

In *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 224 Fed. 566, 573-574 (D. C. S. D. N. Y.) Aff'd 227 Fed. 446, (C. C. A. 2nd Cir.), Judge Howe of the District Court made a similar statement.

Observations on the Common Law of Price Maintenance.

Prior to the enactment of the fair trade acts, the common law had developed a well established body of law dealing with the protection of a trade-mark by vertical resale price maintenance. The following observations may be made with respect to this law:

1. While this Court has held as erroneous the earlier view of the lower federal courts that under the patent law, the copyright law and the law with respect to secret processed goods, a monopoly was conferred broad enough to sustain vertical resale price maintenance contracts against the charge of their being in restraint of trade, or illegal as tending to create a monopoly, the Court has never held that at common law a vertical resale price maintenance contract entered into with respect to a trade-marked, named or branded commodity which is in fair and open competition with commodities of the same general class produced by others, for the purpose of protecting the good-will, was illegal.

2. The state cases held that the owner of a trade-mark, or his distributor, had a sufficient property interest in the good will to warrant his protecting it by resale price maintenance contracts, and that such contracts were not an unreasonable restraint of trade if the commodity in question was in competition with other commodities of the same general class produced by others.

3. While it was held that persons having a monopoly in patented commodities, copyrighted articles, or secret-processed goods, could not, by virtue of their monopoly, and in the absence of statutory grant, maintain the resale price of their goods by contract, these holdings left un-

touched the principles involved by the lower federal courts, of contract law, and of interference with the contractual price involved in a resale price maintenance system, pages 40-46 *supra*. Such principles still may apply in any instance where the producer, or distributor, is engaged in marketing an identified commodity which is in fair and open competition with other commodities of the same general class and as to which the producer or distributor has a good-will interest which can be injured or destroyed by price-cutting. This particular aspect of the common law development may be summarized as follows:

The simplest contractual systems which were involved were those in which the producer sold direct to the retailer who marketed the goods to the ultimate consumer. In these instances, the contracts were simple contracts between the producer and each of his retailers, that the retailer would not sell the commodity below the price stipulated by the producer. More complicated contractual systems arose in instances where, between the retailer and the producer, there were wholesalers, jobbers, etc., in the distributive chain. In such cases, the character of the precise contract system employed depended on the nature of the particular business methods used in marketing. Generally, the contracts were entered into by the producer, or his distributor, with each of the wholesalers who agreed not to sell to any retailer without exacting from the retailer an agreement that he would observe the producer's, or distributor's, retail prices. The wholesalers then sold to all retailers in the regular channel on the price maintenance agreements stipulating the producer's or distributor's price.

(a) It was held under contract law that any party to the system could enforce the contract he had with any other party to the system when they were in direct con-

tractual relationship with each other, either by way of a suit for damages, *Garst* v. *Harris*, 177 Mass. 72, 58 N. E. 174; *Clark* v. *Frank*, 17 Mo. App. 602, or by enjoining the breach of the contract, *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144; *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, 27 L. R. A. (N. S.) 395; *National Phonograph Co.* v. *Schlegel*, 128 Fed. 733 (C. C. A. 8th Cir.); *Palmolive Co.* v. *Freedman*, L. R. (1928) 1 Ch. 264; *Murphy* v. *Christian Press Association Publishing Co.*, 56 N. Y. S. 597, 38 App. Div. 426.

(b) On principles of third party beneficiary of a contract, any party to the system could enforce the contract of any other party to the system, to maintain the price, although the two parties were not in direct contractual relationship with each other, and, to this end, could obtain injunctive relief in a court of equity. *D. Ghirardelli & Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041; also *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co.*, L. R. (1915) A. C. 79, where an English court treated each party to the contractual system as an agent of the other parties to the contractual system for the purpose of entering into resale price maintenance contracts, the third party beneficiary not being allowed under the English law to enforce contracts made for his benefit.

(c) By an extension of the law of interference with contractual relationships, injunctive relief was granted in favor of a party to the contractual system, against a non-contracting retailer threatening to cut the price of the commodity, where the retailer obtained the goods with knowledge of the existence of the contractual system. In such cases, the courts held that if the commodity was marketed regularly under a system of vertical resale price maintenance contracts, a non-contracting retailer who

turned up with such goods for sale and sold them at a price cut, may be regarded as having induced a breach of contract. Cases granting injunctions against such non-contracting parties were: *Thomas A. Edison, Inc.* v. *Ira M. Smith Mercantile Co.*, 188 Fed. 925 (C. C., W. D. Mich. S. D.); *The Fair* v. *Dover Manufacturing Co.*, 166 Fed. 117 (C. C. A. 7th Cir.); *New Jersey Patent Co.* v. *Schaeffer*, 159 Fed. 171 (C. C., E. D. Pa.); *World's Dispensary Medical Ass'n* v. *Platt*, 142 Fed. 606 (C. C., N. D. Ill. E. D.); *Dr. Miles Medical Co.* v. *Goldthwaite*, 133 Fed. 794 (C. C. D. Mass.); *Wells & Richardson* v. *Abraham*, 146 Fed. 190 (C. C., E. D. N. Y.) Aff'd 149 Fed. 408 (C. C. A. 2nd Cir.); *Dr. Miles Medical Co.* v. *Jayne's Drug Co.*, 149 Fed. 838 (C. C. D. Mass.); *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. 424 (C. C. A. 7th. Cir.); *Edison Phonograph Co.* v. *Kaufman*, 105 Fed. 960 (C. C., W. D. Pa.); *Authors & Newspaper Ass'n* v. *O'Gorman Co.*, 147 Fed. 616 (C. C. D. R. I.). Similarly, damages have been granted against a retailer who, though not a party to any contract with the plaintiff, in order to obtain his goods, either caused a breach of contract by a party to the contractual system or his vendor caused such a breach, *Garst* v. *Charles*, 187 Mass. 144, 72 N. E. 839.

(d) When such contract systems were used by the owner of a patent or a copyright and the patent and copyright laws of the United States were construed as conferring the right to enter into such contracts under his monopoly, a breach of the contract by price-cutting, by either parties thereto or third persons who had knowledge of the agreements, was regarded as an infringement of the patent or the copyright. *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. 424; *National Phonograph Co.* v. *Schlegel*, 128 Fed. 733 (C. C. A. 8th Cir.); *Edison Phonograph Co.* v. *Kaufman*, 105 Fed. 960 (C. C., W. D. Pa.); *Thomas A. Edi-*

son, Inc. v. *Ira M. Smith Mercantile Co.*, 188 Fed. 925 (C. C., W. D. Mich.); *New Jersey Patent Co* v. *Schaeffer*, 159 Fed. 171 (C. C., E. D. Pa.); *The Fair* v. *Dover Mfg. Co.*, 166 Fed. 117.

III.

The Illinois Fair Trade Act does not violate the due process clause of the Fourteenth Amendment.

In view of the case background of the Illinois statute here challenged and the construction placed upon it by the state supreme court, the validity of the enactment under the Fourteenth Amendment is clear.

(a) The purposes of the statute are within the police power of the State.

As heretofore stated, at pages 8-12, *supra*, the purposes of the Illinois statute are to permit the owner of a good will based upon the use of a trade-mark, trade-name or brand to protect that good will, in the interest of the public, from destruction through price-cutting; to provide a means for eliminating the deception of the public through the use of loss-leaders; to safeguard the public from practices which may drive desirable brands from the market; and to eliminate certain tendencies towards trusts and monopolies in the field of distribution, fostered by the price-cutting of trade-marked goods.

The Supreme Court of California, in the case of *Max Factor & Co.* v. *Kunsman*, 5 Cal. (2d) 784, 55 Pac. (2d) 177, construed the California Fair Trade Act as having the same purposes and recognized them as properly within the police power. An analogous statute adopted in New Jersey in 1916, was interpreted by the New Jersey court as

having the same aims, and such statute was held a valid exercise of the police power. *Robert H. Ingersoll & Bro.* v. *Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030, 89 N. J. Eq. 332, 108 Atl. 128.* Likewise, a statute of somewhat different provision but having similar objectives was sustained. *Commonwealth* v. *Anselvich*, 186 Mass. 376, 71 N. E. 790, 791.

This Court has stated that the protection of trade-marks is a legitimate exercise of the state police power, *American Trading Co.* v. *Heacock Co.*, 285 U. S. 247, 258; *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 99; *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 424 and see *Trade-mark Cases*, 100 U. S. 82, 94.

In *American Trading Co.* v. *Heacock Co.*, 285 U. S. 247, 258, it was said:

> "* * * the Federal statute did not attempt to create exclusive substantive rights in marks, or to afford

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*The New Jersey court said, 88 N. J. Eq. 222, 101 Atl. 1030, at p. 1032:

> "The statute is designed to promote good morals in business. It is an exercise of the police power of the state. That its purpose is within the legislative province, I think, admits of no question."

108 Atl. 128, at p. 129:

> "It is also well recognized that a person has a property interest in his trade-name and good will, and will, even in the absence of statute, be protected against injury to that trade-name and good will. This right has in this state been as above indicated recognized by statute. * * * The proofs before me demonstrate that, if defendant and others are permitted to pursue their practice of price cutting, the business of complainant will be ruined * * * or a method of distribution will have to be adopted which will greatly increase the price to the consumer, * * * that in either event com-

a refuge for piracy through registration under the Act, but to provide appropriate procedure and to give the described protection and remedies where property rights existed. The acquisition of such property rights in trade-marks rested upon the laws of the several States."

And in *United Drug Co.* v. *Rectanus,* 248 U. S. 90, 99:

"There was nothing to prevent the State of Kentucky (saving of course, what Congress might do within the range of its authority) from conferring affirmative rights upon Rectanus, exclusive in that commonwealth, as against others whose use of the trade-mark there began at a later time than his."

The trade-mark is a common subject of state legislation. Forty-five states have statutes extending their protection, Hopkins on Trade-marks, Trade Names and Unfair Com-

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petition will be effectively reduced. And to what useful purpose? So that retailers may make use of the trade-name and good will established after extensive advertising, to the extent that the public have associated with the article a standard of value, to fool the public into a belief that because a standard priced article can be sold at a cut price all other goods sold are similarly low priced; in other words, to defraud the public. It is no answer to say that full value is given by the retailer for each article sold. If such be the fact, a person is defrauded if he buys an article at full price for which he has no immediate need because he is induced to believe it a bargain and thereby deprive himself of the use of the purchase price for other purposes for which he might have used it if he did not think he was getting a bargain. * * * I think it is clear that a state may, in the exercise of its police power, prevent fraud upon its citizens by the use of the trade-name or good will of another. * * *"

petition, 4th Ed., 1924, p. 620; Shoemaker's Trade-marks, 1931, p. 1028. Many of these statutes, as does the Illinois trade-mark statute, Illinois Rev. Stats., Ill. State Bar Assn. Ed., 1935, Ch. 140, pars. 1 to 7, impose criminal sanctions upon the interference with the good-will of a trade-mark owner. The supreme courts of the several states have sustained many types of statutes aimed at protecting the good will of persons dealing in trade-marked goods. Thus, the New York Court of Appeals upheld a statute prohibiting the placing of any commodity, including the replacing of the original commodity, in a package which bore the trade-mark, name or brand of the owner and from which the original commodity had been removed, *People* v. *Luhrs*, 195 N. Y. 377, 89 N. E. 171. A New York statute allowing the owner of a trade-mark to secure, by the publication of a notice for three weeks in a newspaper, the right to exclude all persons from placing liquids in bottles which bore his mark, or to sell or purchase empty bottles bearing his mark, without his written consent, and making any interference with that right a misdemeanor, was held constitutional, *People* v. *Cannon*, 139 N. Y. 32, 34 N. E. 759.

The protection of the public against the various vices inherent in the use of leaders, such as the inveigling of purchasers into a store by the advertisement of an obvious bargain and there selling them other goods of an inferior quality at a sufficiently high price to offset any loss occurring in the handling of the cut-priced commodity, is recognized as a proper legislative purpose. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342; *Tanner* v. *Little*, 240 U. S. 369; *Pitney* v. *Washington*, 240 U. S. 387; *Sperry & Hutchinson Co.* v. *Weigle*, 166 Wis. 613; 166 N. W. 54; *Sperry & Hutchinson Co.* v. *State*, 188 Ind. 173, 122 N. E. 584; *State* v. *Seney Co.*, 134 Md. 437, 107 Atl. 189. These cases establish that a statute having as its purpose the discouragement

or abolition of methods of merchandising which involve the use of indirect price-cutting (such as the giving of trade inducements) lies within the police power.*

The power of a state to enact legislation for the purpose of preventing trusts and monopolies, is equally well established. *Central Lumber Co.* v. *South Dakota,* 226 U. S.

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*In *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 365, Mr. Justice McKenna said:

"But no refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business. It would be an endless task to cite cases in demonstration, and that the supplementing of the sale of one article by a token given and to be redeemed in some other article has accompaniments and effects beyond mere advertising the allegations of the bill and the argument of counsel establish. * * *

"'* * * complainants * * * rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make. Certainly in the first instance, and, as we have seen, its judgment is not impeached by urging against it a difference of opinion. *Chic., Burl. & Quincy R. R.* v. *McGuire* and *German Alliance Ins. Co.* v. *Kansas, supra.* And it is not required that we should be sure as to the precise reasons for such judgment or that we should certainly know them or be convinced of the wisdom of the legislation."

157; *Smiley* v. *Kansas*, 196 U. S. 447; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 107. In *Waters-Pierce Oil Co.* v. *Texas*, the Court said, p. 107:

> "That state legislatures have the right to deal with the subject-matter and to prevent unlawful combinations to prevent competition and in restraint of trade; and to prohibit and punish monopolies, is not open to question. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Smiley* v. *Kansas*, 196 U. S. 447."

It is important to observe that the specific purposes of protecting trade-mark owners against the injurious consequences of price-cutting by the persons distributing their marked or branded goods, the protection of consumers against loss-leader practices, and the discouragement of trusts and monopolies which result from cut-throat competition such as price-cutting encourages, have been recognized by courts at common law as of sufficient public interest to justify a relaxation of common law rule against restraints on trade. Thus, as heretofore shown, contracts having as their purpose the restriction of competition between the vendees and sub-vendees of branded or marked goods are held valid at common law where the goods are in fair and open competition with commodities of the same general class. *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 469, 137 Pac. 144; *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745; *D. Ghirardelli & Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041; *Elliman Sons & Co.* v. *Carrington & Sons*, L. R. (1901) 2 Ch. Div. 275; *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co.*, L. R. (1915) App. Cas. 79; *Palmolive Co.* v. *Freedman*, L. R. (1928) 1 Ch. 264.

In several of the federal cases holding lawful a refusal to sell the price-cutter, the courts have taken pains to express the view that the purposes to be accomplished by preventing the price-cutting of a trade-marked article would justify positive legal protection of vertical resale price maintenance on trade-marked commodities which are in fair and open competition with other commodities in the same general class. Thus, the statement of Judge Howe in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 224 Fed. 566, 573-574 (D. C. S. D. N. Y.), Aff'd. 227 Fed. 46 (C. C. A. 2nd Cir.).

In view of the recognition by so many courts of the legitimate public end to be served by furthering the purposes of the Illinois Fair Trade Act, it would seem beyond question that the legislature was acting within its power in recognizing the evils of price-cutting of commodities sold under a trade-mark, name or brand, and seeking by statute to remedy them.

(b) The means provided in the act are reasonably related to the purposes sought to be effectuated.

The means provided by the Illinois Fair Trade Act for effectuating its purposes may best be understood in the light of decisions dealing with the protection given the trade-mark at common law against price-cutting, pp. 46-51, *supra*, and those which evolved the principles of vertical resale price maintenance in the field of patent, copyright and secret processed goods, pp. 40-46, *supra*.

The cases involving trade-marks established the view that a trade-mark owner, or a distributor, whose goods were in fair and open competition with other goods of the same general class, had a good will built up around a

trade-mark, brand or name which could be injured or destroyed through price-cutting competition among his own retailers and that the public policy which originally dictated the protection of the good will in a trade-mark against the use of the mark on spurious goods, also required the protection of the good will against the use of the mark in cut-price transactions.

This view was a recognition of a broader property interest in the trade-mark owner or his distributor than was accorded by the earlier cases which merely protected the trade-mark owner against "palming off," pp. 46-51, *supra*. This property interest, however, while recognized, was limited in that it merely permitted the owner of the trade-mark good will to protect that good will from price-cutting by voluntary agreement. The injury from price cutting was without a remedy unless the owner or distributor had secured the personal obligation of the price-cutter not to sell the commodity under the mark at the cut-price. Price-cutting of a brand was not *per se* a trespass to the good-will. Nevertheless, the sustaining of such contracts as being in the public interest, permitted recourse, where available, to the contract law of inducing a breach of a contractual relationship, and third party beneficiary doctrine. No case, however, dealing with trade-marked commodities, extended the law so that a person became subject to an action by merely selling the trade-marked goods which he purchased with knowledge of the contracts below the price stipulated in the contracts.

It has heretofore been pointed out that in the field of patent, copyright and secret processed goods, the lower Federal courts, proceeding upon an interpretation of the patent law, the copyright law and by analogy the common law monopoly granted to secret processed goods, gave the

patentee, copyright owner, secret process owner and their licensees, the right by contract to enlarge their monopolies so as to include the imposition by control of restrictions on the resale price at which their vendees and sub-vendees could sell the goods. While these cases did not regard the patent, copyright or secret process monopoly as *ipso facto* conferring upon the patentee, copyright owner and secret process owner the right by mere announcement to establish the resale price of his goods but required that he institute voluntary agreements with his vendees for the vertical maintenance of the resale price, the cases did extend the normal contract principles of third party beneficiary or inducing breach of contract. When a patent owner, copyright owner or secret process owner had once initiated a vertical resale price maintenance system, the right to enforce the price named in his system was treated by the courts as becoming part of his monopoly and a wilful violation thereof by any one with knowledge cutting the price, was punished as an infringement of the patent, copyright or secret process.

The cases under the patent, copyright and secret process law never made it entirely clear whether the remedy given was really based upon the theory of infringement or was merely on an extension or modification of contract principles in regard to inducing breach of contracts and third party beneficiary and making such contract law applicable to the peculiar requirements of vertical resale price maintenance in those cases. It may be said, however, that by a combination of patent, copyright and secret process law together with contract, third party beneficiary and inducing breach of contract law, certain unique principles of law there evolved peculiarly applicable to vertical resale price maintenance. These cases established that a suit might be maintained against a person who had not induced a

breach of contract, in the sense in which that term is generally used in the cases, but had merely purchased goods which he knew were the subject of a vertical resale price maintenance contractual system and resold at less than the stipulated price.

Trade-marks bear some similarity to patents, copyrights and secret processes. One of the purposes at common law for protecting trade-marks, namely, the incentive thereby given producers to serve the public efficiently by producing goods of quality, is a purpose of the patent, copyright and secret process laws. Trade-marks, however, differ from patents, copyrights and secret processes in that they do not, by their nature, involve a monopoly of the making or vending of any commodity. They may be used on commodities which may, or may not, be the subject of a monopoly. While the patent, copyright and secret process law protects monopolies in regard to commodities themselves, the trade-mark law protects merely a monopoly in the use of a mark, not a monopoly having any reference to commodities themselves. From these principles it follows that vertical resale price maintenance, when applied to the purpose of protecting the good will in a trade-mark, brand or name, means the maintaining of the resale price in any instance where the trade-mark, name or brand is used in making the resale, but does not mean maintaining the resale price of the commodity itself, if it is feasible to remove the mark and sell the commodities as unmarked or unbranded goods.

Producers and distributors of trade-marked commodities, in using vertical resale price maintenance systems with respect to trade-marks, found, as already stated, that ordinary contract principles did not extend sufficiently to cover the various peculiarities of the vertical price maintenance

system. The ordinary distributive system functions with a highly specialized division of labor, with numerous sales between many people taking place between the producer and the ultimate consumer. Unless the producer or his distributor could enforce contracts against persons several steps removed in the distributive chain and against persons who, somehow, managed to obtain the goods without entering into such contracts, vertical resale price maintenance could not be achieved.

To one considering the problem it is apparent that rules analogous to those established by the lower federal courts in the patent, copyright and secret process cases, could be applied very simply in the field of trade-mark law and accord the necessary protection. Instead of calling the injury inflicted by a person in breaking such a contract, or the injury inflicted by a person who did not himself enter into a contract but obtained and sold the goods under the trade-mark, brand or name at a cut price with knowledge of the contractual system an infringement it could be regarded as a trespass on the trade-mark and treated as unfair competition. This is just what the Illinois Fair Trade Act and the other fair trade acts have done. The opinion of the Supreme Court of Illinois shows that this was its interpretation of the Illinois Fair Trade Act. The means provided by the act as so construed, involve three separate concepts: first, the concept of restricting the use of a mark; second, the concept of accomplishing this restriction through establishing contractual systems; and, third, the concept of an unauthorized use of the mark after its restriction had been so accomplished as unfair competition, pp. 12-21, *supra*.

Since these means were applied in common law cases to achieve the very purposes of the Act, there is a well estab-

lished body of case law sustaining the means as appropriate to the end.

In *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, the Washington Supreme Court, in referring to a resale price maintenance contract as a proper means of protecting the producer's good will, said, p. 151:

> "It will not do to say that the manufacturer has no interest to protect by contract in the goods after he has sold them."

Similarly, in *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, it was said, p. 747:

> "There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained. Contracts similar to the one under discussion have been considered in a number of cases, and have generally been upheld where, as here, they had no tendency to create a monopoly."

In *Robert H. Ingersoll & Bro.* v. *H. Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030, 89 N. J. Eq. 332, 108 Atl. 128, the court, in speaking of a statutory notice system for maintaining resale prices said, 108 Atl. 130:

> "Complainant does not seek to retain any right in the article itself; it merely seeks to restrain the use of its trade-name and good will, except under conditions fixed by it. It may permit the purchaser of the article to use its trade-name and good will under such conditions as it sees fit."

Other common law cases have emphasized the appropriateness of resale price maintenance contract systems to

protect the good-will of the producer or his distributor in his trade-mark, from the particular point of view that price-cutting will cause such a lowering of prices that retailers will refuse to handle the goods, and the loss of such retailer good-will results in a loss of consumer good-will. A contract with the retailers in which they voluntarily agree to maintain prices, is a most pointed method for insuring the retention of retailer, and, consequently, all good-will. *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co.* (1915) 1 Ch. 79, 90-92; *Thomas A. Edison* v. *Ira M. Smith Mercantile Co.*, 188 Fed. 925, 927 (C. C. W. D. Mich.). Also *United States* v. *Colgate & Co.*, 253 Fed. 522, 527, Aff'd. 250 U. S. 300.

The maintenance of a resale price by contract on trade-marked goods, when sold under the mark, has also been recognized as a proper means for the protection of the public against such consequences of price-cutting, such as the inveigling of consumers into buying cheaper goods, the debasing of the quality of the commodity, and the reduction of the number of retail outlets willing to serve the consumer. In *Robert H. Ingersoll & Bro.* v. *H. Hahne & Co.*, 89 N. J. Eq. 332, 108 Atl. 128, 130, it was said:

> "* * * to permit defendant to avoid the effect of the notice would be to permit an act which would tend * * * to defraud the public."

On the general proposition that the discouragement or abolition of price-cutting is a proper means to protect the public from the injuries resulting when consumers are continually being induced to make bad bargains: *Rast* v. *Van Deman*, 240 U. S. 342, 365.

In reference to the use of maintained prices on trade-marked goods to prevent a lowering of quality of goods

sold the public: *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, 151. Also, page 33, *supra*.

As to the effectiveness of vertical resale price maintenance contracts on trade-marked goods in fair and open competition with other goods of the same general class, as a means to prevent certain undesirable forms of competition which lead to higher prices and tend toward monopolistic control: *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, 148, 151:

> "Fairly considered, the contract, while slightly restricting competition, is primarily intended to promote competition by enabling the appellant to compete with other high grade flours while maintaining the excellence of its products. * * * Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence."

And, in *Ford Motor Co.* v. *Boone*, 244 Fed. (C. C. A. 5th Cir.) at page 341:

> "Does any one suppose that such dealers would for any considerable length of time cut the price? In the light of experience is it not so probable as virtually to amount to a certainty that the prices would soon reach a common level, and that level would be higher than the present one? Upon the other hand, will the public not have the benefit of the freest and most effective competition if each patentee manufacturer of automobiles is permitted to market his product in his own way? May it not be assumed that, impelled by considerations of self-interest, he will select the most

economical method, and that the keen and vigorous competition of innumerable other manufacturers will force him to give to the public the major benefit arising from his economies?"

Also, *Robert H. Ingersoll & Bro.* v. *Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030, 1032; 89 N. J. Eq. 332, 108 Atl. 128, 130.

This Court has held that the elimination of price-cutting might be viewed as a proper means for prohibiting monopolies, *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157.

If it be accepted that a contract system is a proper means of achieving vertical resale price maintenance, then making the breach of such contracts by parties thereto or by acts of third persons who knowingly sell goods at less than the price fixed in such contracts actionable as unfair competition, is also a means reasonably adapted to the ends of the statute. It has been held by this Court that where certain contracts are of public interest, it is within the power of the legislature, as a means of protecting those contracts, to make conduct of a person in buying goods to which the contract relates and selling them in disregard of the contract even though he is not a party to the contract and does not induce a breach in any other sense than that he buys and sells goods which he knows to be subject to the contractual arrangements, actionable. *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Marketing Assn.*, 276 U. S. 71. If the purposes which the State of Illinois intended to further by recognizing vertical resale price maintenance contracts on the trade-marked goods within the Act, were within province of the legislature, it had the power to make effective the Act by providing a means of extending its operation to non-contracting persons outside of the regular distributive channel.

The objection that the statute does not provide a means of eliminating all of the abuses of the character which the legislature sought to remedy, does not go to the constitutionality of the Act. *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157. Nor is the objection that the means provided by the statute may prevent the appellant or other persons engaging in harmless or even beneficial conduct on some occasions, a constitutional one, *Booth* v. *Illinois*, 184 U. S. 425, 429; *Otis* v. *Parker*, 187 U. S. 606, 609.

Some of the briefs in this Court, attacking the constitutionality of the fair trade acts, assert that they will operate to create monopolies, to regiment industry, and to fix the price of all commodities. The Act, it is to be noticed, as interpreted by the Illinois Supreme Court cannot possibly have any such consequence. No producer or distributor can make any use of its provisions unless the goods he sells are subject to the competition of like goods in the market. If the producer or distributor does fall within that class, he still will be unable to avail himself of the Act unless the wholesalers and retailers through whom he distributes agree voluntarily by contract not to resell under the trade-mark, brand or name of the producer or his distributor at less than the stipulated price. The establishment of such a contractual system would be impossible in many lines of goods because by their nature they require quick turn-overs, even at cut-prices, or are subject to peculiar market conditions which make it desirable for the prices to vary between different outlets. And even in those instances where the goods are adapted to vertical resale price maintenance contracts for the purpose of preserving the good will in the mark from injury at the hands of price-cutters, a contractual system will not be set up unless market conditions are subjecting the good will in question to injury from extreme cut-throat price-cutting. The adop-

tion of such a system will not mean that retailers generally will be prohibited from varying somewhat from the stipulated price. A producer or distributor is not going to incur the expense of a court action unless the price-cutting indulged in is extreme and threatens the good will with serious injury or destruction. And then even in a court proceeding, under the decision of the Illinois Supreme Court, the only relief which can be granted is the enjoining of the future use of the trade-mark, name or brand in cut-price sales or the granting of damages for injury which can by ordinary rules of evidence be established to have resulted to the plaintiff from the wilful and knowing acts of the price-cutter.

The Act, no matter how undesirable it can be viewed, cannot possibly have any of the myriad disastrous effects to society which opponents of the Act contemplate.

(c) The Fair Trade Act as construed by the Illinois Supreme Court is not so indefinite in its terms as to violate the due process clause of the Federal Constitution.

Whether the terms of any given statute are so indefinite as to render the act in question unconstitutional depends entirely on the nature and purpose of the statute and the degree to which previous case law and business experience provide a criteria by which to interpret the terms of the statute. The Fair Trade Act prescribes that defendants are only subject to action in instances where they have acted wilfully and knowingly to the damage of the plaintiffs in doing certain specific acts, namely, making a sale of a commodity under a trade-mark, brand or name, at less than the resale price stipulated in contracts between the producer or distributor of trade-marked goods and their vendees. The action provided is either in equity for in-

junctive relief, or at law for the recovery only of compensatory damages, as for unfair competition. In a statute operating in only these ways, its terms need not be as definite as in a statute providing criminal sanctions, imposing penalties or unsettling status rights or titles, *Miller* v. *Schoene*, 276 U. S. 272, 281. Also, Freund, *Legislative Regulation* (1932), pp. 231-254.

From the point of view of the producer or distributor, if the Act permits the fixing of a price on commodities in any instance rather than the mere restriction of the use of a mark, brand or name, and any change in the previous law is thereby made, the statute operates by way of relaxation of the state anti-trust law. Thus, in any instance in which the protection of a good will built up around a trade-mark, brand or name, can only be achieved by restricting the resale of the commodity, as where the mark cannot be conveniently removed from the commodity in question, a producer or his distributor must judge at his peril whether his commodity comes within the class defined in the Fair Trade Act. If his commodity is not one of standard quality bearing a trade-mark, brand or name sold in fair and open competition with other commodities of the same general class, and the contracts he enters into tend to give him a monopolistic control of the price on the commodity itself, the producer or distributor runs the chance of criminal prosecution under the Illinois Anti-Trust Law. The indefiniteness of terms in this respect, if any, cannot be complained of by the defendant. Nor can such indefiniteness in this respect injure the public, because by the very reason of the indefiniteness, the possibility of prosecution under the Illinois Anti-Trust Law, will deter use of the Act, in any case where it is not clear that vertical resale price maintenance establishes a price which is ultimately the result of the competition between the various brands in the market.

From the point of view of the price-cutter, the statute, by requiring proof that he wilfully and knowingly sold a commodity bearing a trade-mark, brand or name at less than the resale price stipulated in the contracts entered into by the producer or distributor with his vendees, safeguards price-cutters from liability in any instances in which they do not commit an intentional wrong. The possibility that the price-cutter may be unable to determine definitely whether the contracts, maintaining the resale price of which he has knowledge, operate as to a commodity which is in fair and open competition with other commodities of the same general class, is the same difficulty encountered by any person who interferes with a contract which by its nature may or may not create an illegal restraint in trade, dependent upon the actual facts as to the competitive market. Neither the common law concept of a restraint of trade, nor the federal or state anti-trust legislation, provide any criteria for determining what is illegally monopolistic and what is fairly competitive, except the intrinsic idea of a monopoly itself.

All cases at common law permitting vertical resale price maintenance contracts as to trade-marked commodities prescribed the limitation that such contracts were only valid where the commodity bearing the mark, name or brand was itself in fair and open competition with like commodities. These cases developed a sufficiently definite application of the words "fair and open competition" so that the Illinois Fair Trade Act may be read in their light. These cases hold that in order to be the subject of vertical resale price maintenance contracts adopted to protect the good will in a trade-mark, brand or name, the commodity must be subject to the competition of other commodities which would serve the public as adequately as the commodity in question. Thus, flour must be in competition with

other flour of the same quality, an automobile must be in competition with other automobiles, olive oil must be in competition with other olive oils, ground chocolate must be in competition with other ground chocolate, tires must be in competition with other tires, and soap with other soaps.

The case of *Fisher Flouring Mills* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, discussed at great length the criteria which were to be used in determining whether a commodity was in fair and open competition with other commodities of the same general class, for the purpose of a vertical resale price maintenance contract. It was there pointed out that each case must be determined upon its own facts, and the test of validity was whether the contracts gave the producer or distributor either practical control of a market or any approximation to monopoly, the test being the same as that applied in all cases under the common law rule of illegal restraints on trade. The basis for drawing the line at this point was stated by the Washington court, 137 Pac. 148:

> "In the absence of a monopoly, either actual or potential, as above defined, a contract fixing retail prices to the consumer cannot have an effect appreciably inimical to the public interest because it cannot fix prices at an unreasonably high figure without defeating its own purpose by either signally failing to maintain the fixed price, or putting the individual manufacturer out of business. In either case, it fails to restrict competition. Either the consumers will not buy the product at the price fixed, or, if they do, the high price will stimulate competition in production and the price will inevitably fall. The given manufacturer will thus be compelled to accept one or the other alternative. He must either fix the price to cover only a

> reasonable profit, or he must retire from business, and this for the simple reason that, in the absence of a monopoly either actual or potential, of the entire supply, the natural conditions of trade will defeat any attempted restriction of competition."

In that case the contracts resulted in the maintenance of the price on only one brand of high grade of flour which competed in the market with many brands of high grade flour, and the contracts were upheld.

The Washington court considered an objection which has been raised by opponents of the Act, namely, that without horizontal combination all producers might institute identical vertical resale price maintenance contracts and thus bring about the same results which arise through horizontal combination.* Answering this the court said (137 Pac. 148):

> "It may be objected that, since protection against general restriction is the basis of the rule of public policy, then if a general restriction is brought about by all, or nearly all, of the dealers in a given commodity in a given area making contracts of the same character with all retailers, the public interest is injuriously affected just as if there were an actual combination or contract creating or approximating a monopoly. The possibility of such a result as a mere coincidence, however, is too remote to furnish a reason for declaring the contracts of a single manufacturer who has no monopoly or approximation thereto void. * * * No such condition, however, is presented by the record before us."

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*Economists regard this objection as unrealistic, Seligman and Love, *ibid.*, pp. 233, 260.

The courts in specific cases have taken judicial notice of whether or not a commodity was in fair and open competition with other commodities for the purpose of permitting vertical resale price maintenance in the protection of the good will of the trade-mark owner or distributor. In *Grogan* v. *Chaffee,* 156 Cal. 611, 105 Pac. 745, the court said (105 Pac. 747):

> "The contract here relied on does not relate to any olive oil except that manufactured by plaintiff. There is no suggestion that this comprises all, or any large proportion, of the olive oil manufactured or sold in the market supplied by plaintiff. While plaintiff alleges that he manufactures oil by a process of his own discovery, there is nothing exclusive in the product resulting from this process. All that he claims for his oil is that it is pure and wholesome. The court must assume, as a matter of common knowledge, that others may and do manufacture pure olive oil in considerable quantities."

In *D. Ghirardelli & Co.* v. *Hunsicker,* 164 Cal. 355, 128 Pac. 1041, the court quoted the above language from the *Grogan* case, and said (128 Pac. 1044):

> "The same is substantially true of plaintiff's ground chocolate. That it comes anywhere near controlling the market in ground chocolate is not suggested, and as a matter of common knowledge we do know that others may and do manufacture and sell such chocolate in considerable quantities."

Also *Cole Motor Co.* v. *Hurst,* 228 Fed. 280, 284 (C. C. A. 5th Cir.):

> "There are a multitude of other companies from whom purchasers can readily obtain motor cars, vary-

ing in little, if anything, from the perfectibility of the car made by the plaintiff company. * * *

Was it not, then, easily possible that * * * any one might have purchased a Ford, a Cadillac, a Pierce-Arrow, a Packard, a Chalmers, a Hudson, or any other of the multitudinous machines which are being constantly manufactured and offered for sale at widely varying prices?''

On this point, also, *Ford Motor Car Co.* v. *Benjamin Boone, Inc.*, 244 Fed. 335, 341 (C. C. A. 9th Cir.).

The English courts applied the same rule: *Palmolive Co.* v. *Freedman*, L. R. (1928) 1 Ch. 264, 277, 281; *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co.*, L. R. (1915) A. C. 79, 90.

The suggestion by appellant in the instant case (Appellant's Brief pp. 17-20) that in determining what are commodities of the same general class, resort must be had to the Illinois Trade-Mark Act, ignores entirely the purpose of the provision that the vertical resale price maintenance contracts allowed for the protection of the good will in a mark, brand or name, apply only to goods which are in fair and open competition with other goods of the same general class. The forty-nine classes defined in the Trade-Mark Act were groupings made entirely for convenience in administering the registration of trade-marks. The groupings were not concerned with the prevention of monopolies but only with the prevention of the use of a trade-mark of a producer on goods so related in nature to goods produced by some other producer who used the same mark on his goods that the public might be deceived as to their source.

Any indefiniteness which the statute may have had in a literal reading, before the decisions of the state supreme

court in the instant case and in the *Seagram* case now pending before this Court, has been removed by those opinions. This Court has often stated the rule that when passing on the validity of state legislation it will consider the construction placed thereon by the highest court of the state, the same as though the definitions and applications given, were terms of the legislation itself. *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32, 34, 35. In advance of a construction of a state statute in regard to its application to any given situation it will not be assumed that a construction will be adopted or an application made which will render the statute unconstitutional. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 186; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544, 545, 546; *Arizona Employers' Liability Cases,* 250 U. S. 400, 430.

On appeal from a state decision which has applied a statute in terms broad enough to cover applications which would be unconstitutional, where the state court, itself, has by its decision limited the statute and applied it in an entirely constitutional manner, the vagueness of language will not be considered for the purpose of holding the statute unconstitutional. *Smiley* v. *Kansas,* 196 U. S. 447, 455. All presumptions in favor of the constitutionality of a statute must be indulged in, and it must be assumed that the statute will be given an interpretation consistent with its spirit rather than with its mere literal letter, *Raschen* v. *Ward,* 279 U. S. 337, and that the history and circumstances of the adoption of the Act will govern its interpretation. *In re Martin,* 283 Fed. 833; *cf. Holy Trinity Church* v. *United States,* 143 U. S. 457; *Texas & Pac. Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197.

(d) The Illinois Fair Trade Act, as construed by the Illinois Supreme Court, does not delegate to any persons the power to regulate prices of commodities sold by others.

The contention of appellant that the Fair Trade Act delegates to any persons who choose to avail themselves of that delegation the power to regulate the prices of commodities sold by others, ignores the construction placed on the Act by the Illinois Supreme Court. The opinion of the court below construed the Act as merely permitting producers and distributors who had built up a good will around a trade-mark, brand or name, to restrict the use of the trade-mark, brand or name in a sale at a price below that stipulated by them. The state court expressly stated that the Act did not permit any one to place any restrictions on the price of commodities themselves, as such. It was pointed out that the only possible effect of the Act on the price of commodities would occur when the commodity became involved in an injury to the good will of a trade-mark owner or distributor by the sale of the commodity with the trade-mark, brand or name affixed thereto. The Act does, under the construction placed thereon, permit trade-mark owners or distributors who have built up a good will around the trade-mark, brand or name, to restrict the use which third persons may make of the trade-mark, brand or name. However, this does not involve a delegation of power over the property of third persons. The property in the good will belongs to the trade-mark owner, or his distributor, and third persons who buy commodities having affixed thereon a trade-mark, brand or name, which carries with it certain of the good will of the trade-mark owner or distributor do not thereby acquire a property interest in the good will which will permit them to use that good will in a manner injurious to the producer or distributor.

(e) The decision of the Illinois Supreme Court in the instant case does not deprive the appellant of his property without due process of law.

The appellant admitted the purchase of a quantity of "Old Quaker," which he seeks to sell at a cut price, from persons other than the appellee (Appellant's Brief pp. 8, 14, R. 14-15), subsequent to the time he knew that the appellee and the other distributors of "Old Quaker" had established a contractual system with their retailers to fix the retail price at which "Old Quaker" whiskey should be sold to the consumers (Appellant's Brief p. 7, R. 14-15). When the instant suit was instituted, the appellant was advertising for sale, offering for sale and selling this whiskey under the trade-mark and name of "Old Quaker" at a price approximately 20% below the uniform and standard price fixed in these contracts, which latter price was being generally observed by more than 85% of the retailers selling "Old Quaker" in Chicago (Appellant's Brief pages 6 to 7, 10, R. 13-14). For the purposes of this case it stands admitted that this conduct on the part of the appellant caused and threatened the appellee great loss and irreparable injury (Appellant's Brief p. 7, R. 13-14). The injunction obtained by the appellee merely enjoined the appellant from advertising for sale, offering to sell, or selling, at retail, in the City of Chicago, whiskey bearing the trade-mark and trade-name of "Old Quaker" at prices below the uniform retail price established in that city for that brand in contracts entered into by retailers of the brand with their respective vendors pursuant to the Fair Trade Act (Appellant's Brief p. 2, R. 26). The Supreme Court of Illinois stated in its opinion that this injunction left appellant free to sell the whiskey he owned at any price he pleased so long as he first removed the trade-mark "Old Quaker" there-

from (R. 55). It is this injunction under these circumstances, which appellant claims deprives him of his property without due process of law. Appellant's position upon analysis, is that he has a constitutional right to use and sell his whiskey under the trade-mark, brand and name of "Old Quaker" at any price he pleases.

The question raised is whether it is within the police power to provide against predatory price-cutting by permitting the owner of a good will built around a trade-mark, or his distributor, to restrain persons who, subsequent to the time that they know of steps taken by the owner or his distributor to maintain by contract a price to be observed in sales in which the mark or name is used, acquire property bearing that mark or name, from using the mark or name in a sale of the property at less than the owner or distributor's price, where no attempt is made to restrain the sale of the commodity at any price the owner pleases so long as he does not use the trade-mark or name in effectuating this sale? Stated otherwise, is it within the police power to protect a business which has grown up around a trade-mark, trade name or brand from the injury or destruction which price-cutting will occasion by the mere placing of a restraint upon the price-cutter's use of a trade-mark, name or brand without placing any restraint on his right to remove the mark and dispose of his property as he pleases?

None of the cases cited in appellant's brief in support of his position, discussed the question as thus stated, nor do they have any bearing on a decision of that question. The court below pointed out that all the appellant was urging he had the right to do was to "filch" the good will built up around the trade-mark "Old Quaker" (R. 53).

It is the very nature of a trade-mark that persons who purchase commodities bearing the trade-mark must, when they make use of the commodity without removing the mark, observe certain rights of those having a good will built upon the use of the trade-mark. Statutes extending the protection given the trade-mark owner by placing restrictions on the use of the mark by third persons who buy the property bearing the mark have always been held constitutional on this basis. Thus the New York Court of Appeals in the case of *People* v. *Luhrs*, 195 N. Y. 377, 89 N. E. 171, in sustaining such a statute said:

> "In buying a bottle with a trade-mark thereon, the producer does not acquire the right to use the trade-mark except to sell the original contents of the bottle."

This Court held in *Bourjois & Co.* v. *Katzel*, 260 U. S. 689, that a person who bought cosmetics bearing the trade-mark, brand and name of the producer did not have the right to sell those commodities under its marking where the producer had given another the exclusive license to use the trade-mark in the United States. In that case, this Court recognized the right of a trade-mark owner arbitrarily to deprive the owner of goods purchased from the trade-mark owner of the right to use the trade-mark, brand and name in making their resale in the United States by allowing the trade-mark owner to license another person to make the exclusive sales in this country. This Court there said (p. 692):

> "Ownership of the goods does not carry the right to sell them with a specific mark."

That the owner of goods bearing the trade-mark when he sells the trade-marked goods by the very nature of the trade-mark has an interest in the use to which the goods,

so long as they bear that mark, name and brand, are put, was expressed by one federal court which said:

> "In the very nature of the case, as it seems to me, the trade-mark must be something other than, and separate from, the merchandise," (*Davis* v. *Davis*, 27 Fed. 490, 492 (C. C. D. Mass.).

It is to be noted that the use which the appellant insists that he is unconditionally entitled to make of the trade-mark "Old Quaker" because he happens to own some whiskey which bears that mark and name, is a use which aside from the Illinois Fair Trade Act is regarded by many business men and economists as unfair competition.

Assuming that the Fair Trade Act empowers the producer or his distributor to determine, by making contracts with their respective retailers, the price at which nonconsenting retailers such as the appellant may sell commodities and not merely to restrict the use of the mark unrelated to the sale of the commodity itself, still the Act is constitutional and does not deprive appellant of his property without due process of law. The due process clause of the Fourteenth Amendment does not prevent a legislature from imposing limitations and restrictions on the freedom of an owner of property to sell his property at any price he may choose. *Nebbia* v. *New York*, 291 U. S. 502; *Central Lumber Company* v. *South Dakota*, 226 U. S. 157. Accordingly, the right of a property owner to fix a resale price for his own property is no greater than the right to determine any of the other features of a sale of goods.

In *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Marketing Assn.*, 276 U. S. 71, it was held that the sale of property by warehousemen who knew that the person from whom he had purchased the property be-

longed to a co-operative marketing association, could be entirely prohibited.

In *Raschen* v. *Ward*, 279 U. S. 337, it was held that the owner of eye glasses and other optical supplies could be restrained by legislative enactment from selling his property unless an optician were present at the counter where the property was sold.

In *Lemieux* v. *Young*, 211 U. S. 489, it was held that the legislature could prohibit persons conducting stores from making a sale in bulk of all their assets without first giving notice to all their creditors.

In *Booth* v. *Illinois*, 184 U. S. 425 and *Brodnax* v. *Missouri*, 219 U. S. 285, it was held that a legislature could abolish entirely the right of a property owner to fix as a condition of his sale that the goods should be subject to future delivery.

It has heretofore been pointed out that the purposes of the Fair Trade Act are proper ends for the exercise of police power, pp. 58-64 *supra*, and that the means employed by the Fair Trade Act for the achievement of those purposes are appropriate, pp. 64-74, *supra*. The means do not operate arbitrarily and unreasonably in the restriction of appellant's rights. In the instant case he purchased the Old Quaker in question, with full knowledge that the owners of the good will in Old Quaker had adopted contracts with all their retailers, by which the retailers undertook not to resell Old Quaker at less than a fixed price. The admitted facts in the case show that this price was fair and reasonable; that the adoption of this price had led to greater purchases of the commodity by customers and that the margin between the wholesale price and the stipulated retail price yielded a fair profit to retailers. The only restriction which is being placed on the appellant's right

to use his property, is that he is not permitted to sell Old Quaker, at less than this price. This means that he is not prohibited from using the product for the ordinary purposes of retail at the prevailing market price. He is merely restrained from using the commodity as a "leader." He is not asked to sell the commodity at a price higher than customers will pay. The admitted facts in the case show that other retailers have no difficulty in securing sales at the stipulated price. The appellant is not being deprived of the right to make as large a profit as he desires on the commodity because the Act does not permit, and the appellee does not attempt to limit, the right of appellant to sell Old Quaker at as high a price as he chooses. The sale by the appellant at the cut-price will cause the appellee a great loss and injury through the destruction of its good will, will cause other retailers to breach their contracts with appellee and will also cause the public injury in the numerous ways heretofore enumerated. When such great evils will result from the appellant's conduct and the restrictions placed on that conduct in order to prevent the evils are as narrow and limited as those here involved, it cannot be said that the Fair Trade Act operates arbitrarily and unreasonably.

The exercise of police power always operates through the restraint on the conduct of some persons or the restriction of their property rights but such a restraint or restriction, when merely necessary to preserve property rights of other persons from destruction and when the legislature determines that those protected property rights are socially desirable, will be sustained by this Court, unless either the evils which the legislature supposed to exist could not reasonably have been found to exist or unless the means adopted to remedy those evils cannot be said to be reasonable means for achieving the purpose.

Much of appellant's argument proceeds on the supposition that persons may purchase property without knowledge of the existence of vertical resale price maintenance contracts and, later, before making a sale of the property discover their existence (Appellant's Brief p. 14). Whether or not the Act is applicable in such a situation has not been determined by the Illinois Supreme Court. The appellant in the case at bar did purchase his property with full knowledge of such a system. This Court will not, in advance of a construction by the Illinois Supreme Court on this point assume that the Illinois Supreme Court would hold the Act applicable in such a situation. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 186; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544, 545, 546; *Arizona Employers' Liability Cases,* 250 U. S. 400, 430. And, even if the language of the statute is broad enough to cover such a situation, on an appeal from an application of the statute in an instance where the appellant purchased the property with full knowledge, the statute will not be held unconstitutional because of the possibility that it might be applied in a situation where it would be unconstitutional. *Smiley* v. *Kansas,* 196 U. S. 447, 455.

The appellant further argues that there are no restrictions placed on the price which a producer or his distributor may set as the resale price (Appellant's Brief p. 15). While the statute does not in terms impose a standard which producers or their distributors must conform to in fixing the price, a producer or distributor destroys his own business if the price established in the contracts is not a fair and reasonable price in the given market. The producer or his distributor is only permitted to stipulate a price by contract with retailers in instances where his goods compete fairly and openly in the market with other goods of the same kind. If the price should be higher than that

of other similar goods, consumers will not purchase and the producer's and distributors' businesses will be ruined; if lower, the Fair Trade Act in no wise restricts the appellant or any other retailer from selling it as high a price as he may desire.

That the statute by the very nature of its provisions will in practical operation only result in the establishment of a reasonable price actually determined by the competitive condition of the market itself, has been noted in many of the cases dealing with vertical resale price maintenance of trade-marked commodities, *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, 148; *Ford Motor Co.* v. *Benj. E. Boone, Inc.*, 244 Fed. 335, 341 (C. C. A. 9th Cir.); *Cole Motor Co.* v. *Hurst*, 228 Fed. 280, 284 (C. C. A. 5th Cir.).

Further, the Act when applied only in situations where the retailer makes his purchase of the goods with full knowledge of the contractual system, can never result in undue or arbitrary deprivation of property. The Act by its terms merely operates when the goods in question are in fair and open competition with other goods. If the given retailer does not find the price fixed in the contractual system to his liking, he need not deal in that particular brand of goods at all but may deal entirely in other brands. This feature of the Act which in all instances will prevent it from acting arbitrarily and unreasonably to deprive any person of his property, was noted by the Illinois Supreme Court (R. 53). Also *Robert H. Ingersoll & Bro.* v. *H. Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030, 1032.

Further, if any person buys trade-marked goods and decides that the price is inconvenient the Act permits him to discontinue the line by selling at a cut-price after he has offered to resell the goods to the producer at his invoice price, Section 1.

CONCLUSION.

The General Assembly of the State of Illinois found an evil to exist within the borders of the State and made available a remedy. In its purpose, the statute which was enacted commends itself to the ethical standards of the business community and to the practical necessities of commerce. To carry out its purpose, the statute has touched the genius of the common law and there found a true means for operation. The *nisi prius* courts of the State have experienced no difficulty in applying the Act, and the State reviewing courts, both the Supreme and the Appellate, have already pointed the path. The record here is proof of the fairness and reasonableness of its provisions.

It is respectfully submitted that the decree of the Supreme Court of the State of Illinois be affirmed.

Respectfully submitted,

HAMILTON MOSES,
WALTER BACHRACH,
STANLEY J. MORRIS,
R. WEYAND,
Counsel for Appellee.